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Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1971

HARRY R. BOOTH,

Petitioner,

vs.

LEMONT MFG. CORP., CECO STEEL PRODUCTS CORP., PUBLICKER CHEMICAL CORPORATION, AMERICAN OIL CO., UNION TANK CAR CO., CORN PRODUCTS CO., METROPOLITAN SANITARY DISTRICT OF GREATER CHICAGO,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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INDEX

	PAGE
Opinions below	1
Jurisdiction	2
Statement of grounds upon which this Court's jurisdiction is founded	2
Statutes and Constitutional Provisions	3
Questions Presented	4
Statement of the Case	5
Reasons for Granting Writ	
A major reason for granting this Petition is that the opinion of the Court of Appeals is predicated upon the assumption that there have been no developments in the fields of due process, equal protection of the laws, public actions and federal jurisdiction as a result of decisions of this Court during the past 60 years, other than *Angel* v. *Bullington,* 330 U.S. 183 (1947) and *Skelly Oil* v. *Phillips Pet. Co.,* 339 U.S. 667 (1950). Neither it or the District Court displayed proper consideration or regard for the decisions of this Court; and the separate issues decided by them are, as argued below, in conflict with this Court's decisions and principles. The errors were compounded when it sanctioned a District Court judgment based on conclusions illustrated by a finding it would not hold an Illinois law in violation of equal protection rights as it assumed contrary to plain legal history this would force state courts to entertain remote taxpayer suits. The District's 1,000,000 taxpayers have been unjustly denied the benefits of constitutional principles applied by this Court in the past 35 years. All this and more demand the exercise of this Court's supervision and the granting of this Petition	11

PAGE

I. Due Process And This Court's Supervisory Powers Require Review Of Judge Kerner's Duty To Disqualify Himself 11

II. Due Process And Equal Protection Issues Were Decided In Conflict With This Court's Controlling Decisions 15

A. The Special Injury Rule Offended the Equal Protection Clause 15

B. The Special Injury Rule Denied Petitioner's Class Due Process Procedural Rights .. 16

C. The Issue Whether Equal Protection and Due Process Rights are Within 28 USC 1343(3) Requires Review 17

III. The Intervening Change In Illinois Law Required Reversal And Remand 19

IV. The Ruling Petitioner Was Estopped From Presenting Constitutional Issues Is In Conflict With This Court's Controlling Principles 22

V. The Nature Of The Interest In Public Property Converted Into Private Property By Corporate Lessees Requires Review 24

VI. Petitioner's Claim Was Founded On A Traditional Joint And Common Claim 26

VII. The Importance Of The Case 26

Conclusion 28

Exhibit I.

Statutes

28 U.S.C. 1254(1) 29

28 U.S.C. 1331(a) 29

28 U.S.C. 1343(3) 29

AUTHORITIES CITED

Cases

PAGE

Angel v. Bullington, 330 US 183, 189, 190 (1947) 23

Barbier v. Connolly, 113 US 28, 31 (1885) 17

Blackman et al v. Stone, 300 US 641 20

Blonder v. Univ. Foundation, 28 L.Ed. 2d 788, 800 (1970) 23

Boddie v. Conn., 397 US 254, 267, 268 (1970) 17

Booth v. Lemont Mfg. Corp. et al., 340 F.2 385 (CA 7, 1971) ..... *passim*

Booth v. Lemont Mfg. Corp. et al, U.S. Dt.Ct. 304 F. Supp. 235 (1969) ..... *passim*

Booth v. Gen. Dynamics Corp. et al, 264 F. Supp. 465 (1967) 5, 8, 17, 26

Booth v. Met San Dist et al, 79 Ill. App. 2d 310, 224 NE2d 591 ..... 5, 7, *passim*

Bordens Products v. Baldwin, 293 US 193, 210 (1934) .. 16

Bryan et al v. Austin, 254 US 933 21

Busse v. Long, 383 F.2d 766, 770 (1967) 19

Butler v. Eaton, 141 US 240, 242, 243 20

Chambers v. Balt. RR Co., 207 US 142, 148 17

Cipriano v. Houma, 395 US 701, 704, 706 (1969) 16, 18

Dierks v. Thompson, 414 F 2d at p. 456 26

Droste v. Kerner, 34 Ill. 2d 495; 217 NE 2d 73, 79, 385 US 465 (1967) (App. 37) ..... 7, 8 *passim*

PAGE

Duke Power Co. v. Greenwood, 299 U.S. 259, 267, 268 .. 20

Eisen v. Eastman, 421 F2d 509, 563 (1969) (C.A. 2) 19

England v. Med. Examiners, 375 US 411 (1964) 23

First Natl Bank v. United Air Lines, 342 US 396, 397 .. 23

Gendel et al v. North Am Car Corp et al (Cir. Ct. of Cook Cy) 69 CH 2770 (1969) 21

In re General Dynamics Original CA7 (1968) 2

Gold v. Lomenzo, 425 F 2d 959 (1970) CA2 18

Goldberg v. Kelly, 397 US 254, 267, 268 17

Grannis v. Ordean, 234 US 385, 394 17

Gulf C & S RR Co. v. Ellis, 165 US 150, 155 (1897) 16

Hague v. CIO, 307 US 496, 508 (1939) 18, 19

Harman v. Forsenius, 380 US 528, 534 (1965) 23

Heilig Bros. v. Kohler 76 Atl 2d 613, 616, 617 (Sup Ct Pa 1950) 25

Herr v. Rudolph, 25 NW 2d 916, 921 No.Dak.Sup.Ct. .. 25

Hoffman v. Northwestern U., 69 CH 2714 (Cir. Ct of Cook Cy) 13

Hornsby v. Allen, 326 F 2d 605 (1964) (CA 5) 19

ICRR v. Olberding, 346 US 338, 214 F 2d 91, 92-95 (CA 7) (1954) 21

Johnson v. Harder, 438 F2d 7, 9, (CA 2) (1971) 18

Lassen v. Arizona, 385 U.S. 458, 468, 469 25

McGuire v. Sandler, 337 F 2d 902 (1964) (CA 5) 19

McLaughlin v. Florida, 379 US 184, 190, 191 (1964) 16

PAGE

Mammouth Oil Co. v. U.S., 275 US 13 (1927) 6

Mansell v. Saunders, 382 F 2d 573 (CA 5) (1967) 19

Moran v. Dillingham, 174 US 153 (1899) 14

In Re Murchison, 349 US 133, 135-137 (1955) 11, 14

Owensboro Water Co. v. Owensboro 200 US 238 (1906) —

Pan Am Oil Co. v. US, 273 US 456 (1927) 6

Paepcke v. P.B.C. et al, 46 Ill 2d 330, 341; 263 NE 2d 11, 18 (1970) 9, 19, 26

Phoenix v. Kolodziejski, 399 US 204, 210, 213 16

Ex Parte Poresky, 290 US 30, 32 (1933) 16

P.U.C. v. Pollak, 343 US 451, 466, 467 15

Ream v. Handley, 359 F 2d 728, 731 (CA 7) (1966) 18

Reford v. Brunswick, 228 US 339 (1913) 14

Snyder v. Harris, 394 US 332 26

Swann v. Charlotte, Mech.Bd. of Ed, 321 F2d 135, 137 (CA 4) (1970) 14

United Mine Workers v. Bibbs, 383 US 715, 726 21

U. S. v. Munsingwear, Inc., 340 US 36, 39, 40 (1950) 20

Zwickler v. Koota, 389 US 241 (1967) 23, 24

Other Documents

Report of Joint Legislative Committee to Investigate Operations of Metropolitan Sanitary Dist. of Greater Chicago. General Findings, (March, April, 1963 Senate Resolution 22, 73rd General Assembly, Illinois 12

PAGE

75th General Assembly (App. 132)

Report of Joint Legislative Committee to Investigate Operations of the Metropolitan Sanitary District of Greater Chicago General Findings 12

76th General Assembly 1970, p. 63;
Report of Local Government Services Subcom of the Municipal Corporate Comm., Illinois Senate; The Metropolitan Sanitary Dist of Greater Chicago, Vol. II, Facts-Summary and Evaluation 12, 27

Report to the President of the United States and the Congress by the Public Land Law Review Commission:
"One Third of the Nation's Land", June, 1970 27

APPENDIX

TABLE OF CONTENTS

	PAGE
Opinion of the Court of Appeals in Booth v. Lemont, et al 440 F 2d 385 January 28, 1971	1
Judgment of Court of Appeals January 28, 1971	5
Order denying Petition for Rehearing and en banc, (March 29, 1971)	6
Opinion of Judge Edwin A. Robson, 304 F Supp. 235	7
Opinion of Judge Hubert L. Will in Booth v. General Dynamics Corp. et al, 264 F. Supp 465	10
Unreported Opinion of Judge Will, April 6, 1967, in same	18
Unreported Opinion of Judge Will, July 31, 1967, in same	21
Opinion of Court of Appeals in re General Dynamics Corp., Original 16456 February 7, 1968	23
Opinion of the Ill. Appellate Court in Booth v. Metropolitan Sanitary District et al 79 Ill. App. 2d 310, 224 NE 2d 591 (1967)	24
Judgment of Circuit Court in Booth v. Sanitary District et al, 63C22180 June 18, 1964	30
Excerpt from Droste v. Kerner 217 NE 2d 73, 77-79 (Ill. Supreme Court 1966)	33
Excerpt from Paepcke v. P.B.C. et al 263 NE 2d 11, 18 (Ill. Supreme Court 1970)	36

PAGE

Droste v. Kerner 385 US 486 Motion by Governor Kerner et al to Dismiss 37

Petition of Appellant Booth for Rehearing and Hearing en banc Court of Appeals 50

Summary of Financial Aspects of Defendants Leases 63

Illinois Senate Resolution No. 22 (1963) Re-Investigation of Metropolitan Sanitary District of Greater Chicago 65

Excerpt 75TH General Assembly Joint Legislative Report Investigation of same Sanitary District (1967) 66

Report of 76TH General Assembly (1970) Municipal Corporations Committee Re-Sanitary District Investigation Excerpts 67

Summary of State Court Decisions of Upholding Common Law Right of Taxpayers to Sue to Review Sales and Leases of Public Property 69

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Now Comes Harry R. Booth, Petitioner, pro se, and respectfully prays that a Writ of Certiorari issue to review the final judgments of the Court of Appeals for the Seventh Circuit in this cause.

OPINIONS BELOW

The decision of the Court of Appeals is reported in 440 F. 2d 385, and the District Court in 304 F. Supp. 235.

The opinions are included in the separate Appendix[1] to this Petition as is the opinion of Judge Hubert L. Will in the companion case of *Booth* v. *General Dynamics Corp. et al.*, 264 F. Supp. 465, his two unreported opinions and the ruling of the Court of Appeals in the *In Re General Dynamics* Original February 7, 1968 (App. 23). The Appendix also includes directly related state court rulings and documents. An index to them is found in this Petition and Appendix.

JURISDICTION

The jurisdiction of this Court is founded upon 28 USC Sec. 1254(1). They are included as Exhibits herein.

STATEMENT OF GROUNDS UPON WHICH THIS COURT'S JURISDICTION IS FOUNDED

1. The Court departed from accepted and usual course of judicial proceedings requiring the exercise of this Court's supervisory powers since Judge Kerner was required by considerations of due process to withdraw from this case.

2. The conflict between this Court's decisions and the judgment below that state denial of procedural due process and equal protection are not personal rights conferring jurisdiction under 28 U.S.C. (1343)(3) require reversal, or in the alternative this Court should settle conflicts on this vital issue between that Court and other Courts of Appeal.

3. It failed to reverse and remand for trial in view of the intervening change in Illinois law.

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[1] Reference to this Appendix are (App.), to Court of Appeals Appendix (C.A. App.), and to Supp. to C.A. Appendix (Supp. C.A.). Abstract in Booth v. San. Dist. et al., 79 Ill. App. 2d 310; 224 NE 2d 591. Both are filed here as part of Court of Appeals Record.

4. The judgment below decided important other federal questions in conflict with applicable decisions of this Court, for:

a. Having assumed the Illinois special injury rule violated the equal protection clause, the Court was under a duty to decide this issue.

b. It erroneously held plaintiff was estopped from asserting constitutional rights and disregarded principles of abstention and equitable factors.

c. It gave effect to state court judgments though plaintiff had challenged them as a fraud and Judge Will held such issue required a hearing.

5. It failed to find plaintiff's action was predicated upon a traditional joint and common claim.

6. It disregarded earlier rulings in the General Dynamics' Companion Case by the Court of Appeals holding in effect Plaintiff's constitutional claims were so substantial as to require a hearing on the merits, and Judge Will's decision upholding federal jurisdiction.

7. It erred in finding plaintiff could not raise constitutional issues for they constituted an anticipation of the defense contemplated by defendants.

8. It was bound to remand the case to the District Court for trial and for reassignment to Judge Will as a related case to General Dynamics.

STATUTES AND CONSTITUTIONAL PROVISIONS

The Constitutional Provisions and statutes relied upon are: 28 USC 1331, 1343(3); Art. III, Sec. 2 and Amendment XIV, Sec. 1. The statutes are reproduced p. 29.

QUESTIONS PRESENTED

1. Was Judge Kerner under a duty to withdraw from the case?

2. Did the denial by the Illinois courts of plaintiff's right to institute a public action to enforce public rights in land leased to the corporate defendants confer jurisdiction under 28 USC 1331 or 1343(3) based on his equal protection and due process procedural and substantive claims?

3. Does the intervening 1970 change in the Illinois special injury rule require reversal of both judgments below under the principle of partial mootness?

4. Did the Court err in holding Plaintiff was barred by estoppel from presenting his equal protection claim?

5. Did jurisdiction nevertheless vest, since the Appeals Court did not apply estoppel to procedural due process claims?

6. Was the Court required to consider the principles of abstention and equitable estoppel?

7. Was it required to consider Judge Will's ruling a hearing was necessary on plaintiff's challenge that the State Court judgment was a fraud?

8. Was Plaintiff's action predicated upon a traditional joint and common claim permitting aggregation of claims within Rule 23?

9. Did the Court err in holding that Plaintiff could have been barred from presenting his constitutional claims as it thought he was anticipating an unconstitutional defense?

10. Were the Lemont and General Dynamics cases related actions so as to require reassignment of the Lemont Case to Judge Will?

STATEMENT OF THE CASE

This suit, called Lemont, is the second federal action[1] instituted by plaintiff as a result of rulings of the Illinois courts[2] dismissing his prior class public action on the principle that only taxpayers suffering private injury possess standing to enforce equitable interests in public property held in trust. His state complaint as amended, in five counts, challenged the validity of some 25 of the District's long term (50-99 years) leases of land adjoining its navigable waterways, improved by large federal and District expenditures, the retroactive recovery of inadequate rentals, a declaratory judgment, judgments against officers of the District and other relief set forth in his extensive pleadings.[3]

The corporate defendants are large industrial corporations, interstate and national in character, similar in nature to numerous other District lessees. The District as of 1963 had executed leases of about 2400 acres for industrial and other commercial purposes. These defendants

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[1] Lemont was filed on Nov. 20, 1968, but the pleading at issue was an Amended Complaint (C.A. App. 1-43). The first federal suit. *Booth* v. *General Dynamics Corp.* (Called G. D. suit) was filed April 14, 1966. Judge Hubert L. Will upheld jurisdiction Jan. 24, 1967—264 F. Supp. 465 (App. 10-17). Court of Appeals on Feb. 7, 1968 denied G. D. Writ of Mandamus. (App. 23).

[2] *Booth* v. *Met. San. Dist. et al.*, filed October 24, 1963. Opinion of Appellate Court, 79 Ill. App. 2d 310; 224 NE 2nd 591 (App. 24-29). Controlled in part by *Droste* v. *Kerner*, 34 Ill. 2d 495, 217 NE 2d 73, 79 (App. 33-35) 385 US 456 (1967).

[3] A brief summary of the pleadings is difficult. The state court complaint and exhibits exceeded 100 pages (See Supp. abstract of record to Appellate Court record included in Court of Appeals record filed here). (1-77, 86-102 Exhibits 41). The Lemont Complaint was 43 pages.

possessed eight leases of which five were for terms of 99 years expiring about the period 2040 to 2050 and three were for shorter terms (App. 63-64).[1] One defendant, Lemont, built a steel plant at a cost of $14 million on the 88 acres it acquired from the District under questionable circumstances. It has been paying annual rent of $2,682; under the terms of its so-called leases it would be no more than $4700 per year until after year 2000. (See App. 63, 64) (See C.A. App. 12-15, 57). Another lessee, Corn Products, was permitted for 99 years to use millions of gallons of water daily though its annual rental for 14.2 acres for more than 50 years did not exceed $2100 per year (C.A. App. 17, 18).

Considering the valuable public land at stake and the wrongful acts by defendant corporate lessees in acquiring it, these suits are generally comparable in major respects to the Teapot Dome litigants.[2] (*Mammoth Oil Co.* v. *U. S.*, 275 U.S. 13 (1927); *Pan American Oil Co.* v. *U.S.*, 273 U.S. 456 (1927).

The pleadings in the federal actions were generally related first to federal jurisdiction and second, specific allegations to the operations of the District, its overall aspects of its long term lease transactions, specific details bearing upon leases of corporate defendants, equitable in-

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[1] HKH Corp. was also a defendant in the courts below. Though the Court of Appeals denied its prayer for damages and other costs in an amount in excess of $20,000 against plaintiff, the risks incidental thereto required him to drop HKH as a respondent.

[2] See Appendix (63-64 and 65-68) Excerpts Ill. Leg. Reports and New Republic, July 3, 1965, p. 915. Chicago—The Low Rent District. Demaris—Captive City—Lyle Stuart Inc. (1969). (See fn. 1, p. 12.)

terests of plaintiffs, related conclusions claiming fraud and prayers for relief. The Lemont Complaint in Count II (C.A. App. 36-42), included a motion for a declaratory judgment based upon allegations that the defendant leases and numerous others were void on their face in that they were executed without competitive bidding, lacked provisions during their 99 year terms or otherwise for periodic redetermination of rentals and other clauses indispensable to a proper public trustee-private corporation relationship.

His jurisdictional allegations claiming the special injury rule violated the due process and equal protection clauses were specific and in detail (C.A. App. 5,6). He also alleged that it discriminated against the poor who owned no real estate and in favor of wealthy citizens, or large private corporations, who, if any, could claim special injury. (C.A. App. 43)

On June 18, 1964 the state court sustained defendant's motions to dismiss plaintiff's action finding "plaintiff does not have legal capacity to bring this action and that the complaint is multifarious". (App. 30-32). The Judge had earlier denied plaintiff's motion he withdraw on the ground his son was a partner in the law firm representing American Oil Company, a major defendant.

This judgment was affirmed by the Appellate Court[1] primarily on the standing issue. It also upheld the Chancellors refusal to withdraw and denied plaintiff's motion to amend his pleading to demonstrate the existence of fraud by intervening facts. While pending on appeal, the Illinois Supreme Court, after two rehearings, confirmed its

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[1] 79 Ill. App. 2nd 310, 224 N.E. 2nd 591 (App. 33-35). Controlled in part by *Droste* v. *Kerner*, 34 Ill. 2nd 495, 217 N.E. 2nd 73, 79 (1966) (App. 33-35) 385 U.S. 456 (1967).

earlier decisions upholding the same special injury rule. *Droste* v. *Kerner*, 217 N.E. 2nd 73, 79 (March 24, 1966). (App. 33-35)

Faced with the hopelessness of relief in the state courts plaintiff filed his first federal action in April, 1966, against General Dynamics Corp. called G.D.

Judge Will upheld federal jurisdiction declaring the District taxpayers though denied a remedy in the Illinois courts possess equitable property interests supporting federal jurisdiction under 28 U.S. 1331 and Article III (264 F. Supp. at pp. 463, 473), qualified his rejection of plaintiff's argument the special inquiry rule violated his equal protection rights. (pp. 468, 469, App. 13, 14)

Later G. D. sought a Writ of Mandamus in the Court of Appeals to compel Judge Will to expunge his jurisdictional ruling or in the alternative to certify the jurisdictional and Rule 23 issues for immediate review under 1292 (b). The Court on Feb. 7, 1968, denied G. D.'s Petition though it held the questions raised by G. D. were substantial but could be presented upon final appeal. (App. 23)

On April 13, 1969 the G. D. case was settled following extensive negotiations, a public hearing, approval by the District, plaintiff, General Dynamics and District Judge Will.[1] Plaintiff believed the jurisdictional issue had been determined in this District Court. An urgent need required the institution of an action against a number of District lessees holding 99 year leases which could not be pressed if plaintiff was compelled to undergo the expensive and time consuming G. D. trial.

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[1] He had not pleaded this rule was in conflict with the equal protection clause.

By his Lemont amended complaint he hoped to solve its complex problems involving numerous long term lease transactions through his request for a declaratory judgment. Its basis was that defendants and other leases were void on their face and contrary to public policy in that they were executed without competitive bidding, provisions for periodic redetermination of rentals, and other indispensable public safeguards.

The corporate defendants each filed motions to dismiss generally upheld by the Courts below (C.A. App. 53-68). These included (1) Absence of substantial federal question. (2) Controversy does not exceed $10,000 and aggregation of claims improper. (3) State judgment res judicata. (4) Laches and other defenses. The District filed a detailed answer generally admitting plaintiff's specific allegations except those alleging fraud and also joining in the relief prayed for by the defendant. (C.A. App. 70-92). Judge Robson sustained the motions of the several defendants to dismiss. 304 F. Supp. 265 (App. 7-9). He upheld the special injury rule and stated that if it were declared "unconstitutional state courts would be forced to entertain the most remote taxpayer's complaints without limitation."[1] (at p. 267)

After the main briefs had been filed, the Illinois Supreme Court repudiated both the special injury rule and its prior decision in *Droste* v. *Kerner* upholding it.[2] The parties then presented conflicting views as to its impact on the case. The defendants claimed it sustained their right

[1] See (App. 69-72) for summary of decisions in 15 states disagreeing with Judge Robson and upholding standing taxpayers to sue to set aside alleged fraudulent or otherwise sales or leases of public property. Defendants did not produce contrary such decisions.

[2] *Paepeke* v. *P. B. C. et al.*, 46 Ill. 2nd 341, 263 N.E. 2nd 11, 18 (Sept. 1970) (App. 36).

to all the relief demanded in their main brief including a holding the state judgment was res judicata against all District taxpayer suits. (Dfs. Rejoinder.)

On November 9, 1970 plaintiff filed an emergency motion to reverse the judgment below and to remand with directions. He contended the controversy between his class and defendants was a continuing one. (C.A. Record) He also requested a hearing en banc and other relief. The motion was overruled with reservation to reconsider such questions. Following the Court's judgment on January 28, 1971 Petitioner filed a petition for rehearing and hearing en banc (App. 50-62), which was denied on March 29, 1971 (App. 6). On June 20, 1971 Justice Marshall extended the time of filing his Petition until August 12, 1971.

A request for a further extension of time has been filed with the Court.

REASONS FOR GRANTING WRIT

I.

DUE PROCESS AND THIS COURT'S SUPERVISORY POWERS REQUIRES REVIEW OF JUDGE KERNER'S DUTY TO DISQUALIFY HIMSELF.

Between 1963 and 1967 while Plaintiff's suits were pending in the Illinois and Federal Courts, Judge Kerner, as Governor and defendant not only was a direct participant in state and federal issues in the *Droste* case (217 N.E.2d 73, 79 (1966), 385 U.S. 486 (1967), but also argued in this Court in support of principles corporate defendants here contended[1] were decisive to Plaintiff's case before the Court of Appeals which he approved in his opinion.

Judge Kerner's[2] failure to disqualify himself appears to demonstrate an insensitiveness to the constitutional principle that due process demands not merely "absence of actual bias" but that "our system of laws has always endeavored to prevent even the probability of unfairness." (*In re Murchison*, 349 U.S. 133, 136). "Circumstances and relationships must be considered for the disqualifying interest cannot be defined with precision," but "Justice must satisfy the appearance of justice." (p. 136). As Petitioner's charges are of a serious nature, more than a routine reference to the relevant "circumstances and relationships" are necessary.

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[1] Brief of Composite Defendants (C.A. p. 24, 25). Motion to dismiss (App. 37-49).

[2] Petitioner regrets any criticism of Judge Otto Kerner which may be implied from this petition particularly in view of his prior association with the earlier Circuit Judge Otto Kerner when Attorney General of Illinois (See *Nat. Pipeline Co.* v. *Slattery*, 302 US 300; *People's Gas Lt. and Coke Co.* v. *Slattery*, 373 Ill. 31; 25 NE 2d 482; 287 Ill. App. 379; 5 NE2d 285; see also *Peoples Gas Co.* v. *Hart*, 309 US 634.

In his opinion (p. 386 and fn 2), Judge Kerner relied upon *Droste* v. *Kerner* for "the judicially created Illinois special injury rule" as barring plaintiff from prosecuting his taxpayer's action in the Illinois courts against the lessees of the District Droste then appealed to this Court. In the Motion to Dismiss filed by the Illinois Attorney General upon behalf of Governor Kerner and another state officer, it was said they moved to dismiss this appeal on the grounds that it does not "present a substantial federal question, and that appellant lacks the requisite standing to support this appeal." (p. 1) (App. 37).

The Index said, "I. B. Appellant's contentions of a denial of due process of law and equal protection of the law raise no substantial federal question." (App. 38). Lessee-defendants in their composite brief, argued: "The validity of the Illinois special injury rule has been sustained by this Court," and that it likewise decided no substantial federal question was present in both cases. (C.A. Br., pp. 24, 25).

Judge Kerner's participation as Governor and as a defendant in *Droste* was not nominal in nature. He approved the statute transferring the disputed land to U.S. Steel, was surely aware of the extensive controversy[1] over the

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[1] Discussion of the District affairs as a whole brought the Chicago Tribune a Pulitzer Prize in 1962 (See p. 3, May 8, 1962). A special Citizens Committee selected a new District General Superintendent, a Grand Jury inquiry indicted two District officials in connection with certain leases, a special legislative committee conducted a number of hearings in March and April, 1963 (Senate Resolution 22, 73rd General Assembly C.A. App. 132, 75th General Assembly Report of Joint Legislative Committee to Investigate Operations of the Metropolitan Sanitary District of Greater Chicago General Findings, p. 3, 5 (See App. pp. 65-67).

District operations and leases. The widespread demands for reform of the overall District operations occurred during his term as Governor (1963-1968). He must have known of the State Legislative investigations into the affairs of the District between 1963 and 1967. The proposals for drastic reorganization of the District's operations included new standards and restrictions governing the execution of future long term leases. He surely knew these statutes could not be made retroactive.

Government officers or agencies defendants in public action litigation do not necessarily give 100% support to corporate defendants seeking to defeat the public interest. In this very series of suits the Sanitary District originally did in the state action support the position of corporate defendants. Here, however, it filed an Answer admitting nearly all plaintiffs allegations (except direct charges of fraud) and supported plaintiff's prayer for relief.[1] Petitioner objects not to the defense of the state's grant to U. S. Steel, but to the acts of the Governor in joining to oppose the standing of its citizens to sue and to assert the absence of federal questions in this Court.

The responsibility for withdrawal from this case rested squarely upon Judge Kerner himself. The acceptance of this principle by other members of the Court is revealed by the action of Judge Wilbur F. Pell, Jr. when on the morning of the oral argument he excused himself. Unlike cases before the District Court, litigants are not aware of the composition of the Court of Appeals panel hearing an appeal until the day set for argument. Under 28 USC

[1] *Hoffman* v. *Northwestern University et al.*, 69 CH 2714, Circuit Court of Cook County, is a suit challenging non-payment of real estate taxes by lessees of educational institutions. The public official defendants have recently filed a counter-claim seeking the relief plaintiff prayed for.

144 failure of litigants to object does not excuse failure of a Judge to take the initiative to withdraw. *Reford* v. *Brunswick*, 228 U.S. 339 (1913); and *Moran* v. *Dillingham*, 174 U.S. 153 (1899). A recent application by Circuit Judge Craven to this statute stressed both the similarity of the issues and the identical nature of the earlier case.[1] The same principle is equally applicable to this case.

In his Petition for Rehearing, Plaintiff said:

> "The Opinion is also without a statement that the position advanced by or on behalf of Judge Otto Kerner as Governor of the State of Illinois in *Droste* v. *Kerner*, 34 Ill. 2d 495, the important part it played in the claims of the defendants, and the ruling of Judge Robson (regardless of the subsequent Paepcke Opinion) did not conflict with the rights of plaintiff's class of one mission taxpayers to a due process hearing within *In Re Murchison*, 349 U.S. 135, 137 and other related expressions by the federal Courts." (App. 53).

The Court denied this request. However, Judge Kerner recently publicly stated that he avoids hearing cases presenting ethical issues when he was quoted in the Chicago Today newspaper on July 29, 1971, as saying:

> Kerner explained that he avoids court cases which raise ethical questions.
>
> "I make quite certain to disqualify myself in any case where I either had an interest in as governor, such as an executive clemency case, or where I have a stock in a corporation that is before the Court."

It would have been equally appropriate for him to have issued the formal statement suggested by Plaintiff. The desirability of this practice was indicated by the statement of Judge Craven in the *Swann case* (431 F. 2d 135, 137 (1970)).

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[1] *Swann* v. *Charlotte—Mech. Bd. of Ed.*, 431 F.2d 135, 137 (CA 4) (1970).

In *P. U. C.* v. *Pollak*, 343 U.S. 451, 466, 467, Justice Frankfurter said:

> "When there is ground for believing that such unconscious feelings may operate in the ultimate judgment or may not unfairly lead others to believe they are operating, judges excuse themselves. They do not sit in judgment. They do this for a variety of reasons. The guiding consideration is that the administration of justice should reasonably appear to be disinterested as well as be so in fact."

This is indeed a case for the exercise of the supervisory power of this Court.

II.

DUE PROCESS AND EQUAL PROTECTION ISSUES WERE DECIDED IN CONFLICT WITH THIS COURT'S CONTROLLING DECISIONS.

A. The Special Injury Rule Offended the Equal Protection Clause.

The Illinois special injury rule required of Illinois taxpayers and citizens to allege and prove special or private injury as a condition to their right to file a public action seeking to safeguard their equitable interest in public property held in trust.

Plaintiff alleged the special injury rule assured judicial remedies only "to a theoretical or substantially nonexistent class" (Par. 8a, C.A. App. 5), created an unreasonable and illogical classification without regard to the nature of the remedy needed to safeguard the rights of the public, discriminated against all or more than 99.9% of the District's taxpayers (Par. 8b and 8c, C. A. App. 5), and arbitrarily discriminated against the poor who owned no real estate and in favor of a limited class of wealthy citizens or corporations operating for profit, (C.A. App. 43).

These allegations required the Courts below to hold the Illinois law to be invidious, that it served no public purpose, arbitrary and void under principles long upheld by this Court. (*Gulf C. & S. R.R. Co.* v. *Ellis*, 165 U.S. 150, 155; *McLaughlin* v. *Florida*, 379 U.S. 184, 190, 191; *Cipriano* v. *Houma*, 23 L. Ed 2d 647, 650; *Phoenix* v. *Kolodziejski*, 399 U.S. 204, 210, 213).

Petitioner pleaded and argued his jurisdictional claims before both Courts entirely upon the denial of equal protection and due process.[1] The facts pleaded by him were not accepted as true contrary to *Bordens Products* v. *Baldwin*, 293 U.S. 194, 209; *Ex Parte Poresky*, 290 U.S. 30, 32.

B. The Special Injury Rule Denied Petitioner's Class Due Process Procedural Rights.

The Court overlooked Plaintiff's basic claim that the Illinois special injury rule denied Illinois taxpayers procedural due process. Illinois taxpayers were denied an opportunity to be heard in the Illinois courts under *Droste* v. *Kerner* and the decisions in Plaintiff's state court action.

In *Barbier* v. *Connolly*, 113 U.S. 28, 31 (1885), this Court declared the right to access to the courts is within the due process and equal protection clauses of the 14th Amendment. Procedural due process is foremost among the vital guarantees of the Bill of Rights. Surely it is equal to the right to vote in local elections.

> "The fundamental requisite of due process of law is the opportunity to be heard." *Grannis* v. *Ordean*,

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[1] He argued his first "claim of federal jurisdiction is predicated upon separate claims of denial of (1) equal protection, (2) procedural and (3) substantive due process rights under 28 USC 1331, 1343(3), Article III, Sec. 2 and Amendment XIV, Sec. 1 (page 15, see also Main Brief, 16, 17, 18-34, 36, 37, 55).

234 U.S. 385, 394; *Chambers* v. *Baltimore R.R. Co.*, 207 U.S. 142, 148."

This principle was reaffirmed by this Court in *Boddie* v. *Conn.*, 28 L. Ed 2d 113, 117 ff. See also *Goldberg* v. *Kelly*, 397 U.S. 254, 267, 268.

Judge Will correctly held the taxpayers equitable interests in public property were based on their ownership of such property. This is the generally long accepted common law rule among the states. A suit to enforce such rights presents a case or controversy within Article III of the Constitution, 264 F. Supp. 465, 469-472.

Since Petitioner and his class possessed rights in property which they were denied the right to protect by access to the Illinois Courts, this Court should grant this petition and hold that they were denied procedural due process, reverse the judgment of the Court of Appeals with instructions that it set aside the judgment of Judge Robson.

C. The Ruling That Equal Protection And Due Process Rights Are Not Within 28 USC 1343(3) Is In Conflict With This Court's Decisions.

The Illinois special injury rule which excluded 99 percent or more of its taxpayers from access to the Illinois courts is in direct conflict with the 14th Amendment principles long upheld by this Court. No bar exists to the claim of jurisdiction under 1343(3) because a jurisdictional claim, firmly as this grounded upon due process and equal protection clauses, also seeks to safeguard and protect public property rights.

In *Cipriano* v. *Houma*, 395 U.S. 701, 702 ff, non-property owners were prohibited by Louisiana law from voting on $10 million of municipally owned revenue bond issue. This Court considered as significant the economic interest of

non-property owners in the municipal plant. It set aside the statute as in violation of the equal protection clause. No issue of aggregation of claims was considered. *Cipriano* was an exclusively local contest involving the right to vote to protect a public economic interest.

Here, however, plaintiff's class of 1,000,000 were denied access to the Illinois courts under an unconstitutional Illinois law. We, as the Cipriano citizens, were entitled to a remedy in the federal courts under 28 USC 1343(3). The Court of Appeals in disregarding this Court's decisions during the past 20 years committed such a grave error as to require review by this Court to safeguard our personal rights of due process and equal protection.

Ream v. *Handley*, 359 F.2d 728, 731, relied upon in the Court's opinion, holds 1343 does not apply "where a person seeks only to protect property or monetary rights." It was improperly expanded, and without precedent, to include personal due process and equal protection claims.

A second reason for review of the issue of property versus personal rights arising since *Hague* v. *CIO*, 307 U.S. 496, 508 ff, is the concern of other federal courts illustrated by decisions in the Second and Fifth Circuits.

In *Gold* v. *Lomenzo*, 425 F.2d 959 (1970) (C.A. 2) Judge Friendly wrote the majority view sustaining jurisdiction under 1343(3) in a case where the plaintiff sought to enjoin the enforcement of a New York City officer suspending his real estate license. Judge Hayes dissented.

In *Johnson* v. *Harder*, 438 F.2d 7, 9 (1971), the Court said:

> "In spite of the attempt of this Court in Eisen to clarify the scope of section 1343(3), the question continues to create difficulties."

And in *Eisen* v. *Eastman,* 421 F.2d 509, 563 (1969), Judge Friendly in an exhaustive review of the personal issues stated:

> "There has been no thorough discussion by the Supreme Court of the scope of 28 USC 1343(3) since Hague v. CIO, 307 U.S. 496 (1939). Apart from its age, Hague casts an uncertain light because of the absence of a majority opinion."

The 5th Circuit has in several cases upheld federal jurisdiction under both 28 USC 1343(3) and 1331, though clearly only property interests were involved or were certainly predominant. *Hornsby* v. *Allen,* 326 F.2d 605 (1964), denial of city liquor license; *Mansell* v. *Saunders,* 372 F.2d 573 (1967) garbage district license denied. See also *McGuire* v. *Sandler,* 337 F.2d 902 (1964). In *Busse* v. *Long,* 383 F.2d 766, 770 (1967), the Court refused to entertain jurisdiction in a case involving a claim assessment of property violated the 14th Amendment. It declined because it believed plaintiff found an adequate remedy was available under Louisiana law. In *Lemont,* Plaintiff's class had no remedy under Illinois law.

The Court of Appeals' conclusion on this highly significant issue of constitutional law will impair the preservation of vital constitutional rights. Review of this decision by this Court is required.

III.

THE INTERVENING CHANGE IN THE ILLINOIS SPECIAL INJURY LAW REQUIRED REVERSAL.

In September, 1970, the Illinois Supreme Court in *Paepcke*[1] finally repudiated the special injury rule including

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[1] *Paepcke* v. *P. B. C. et al.,* 46 N.E. 2d 330, 341, 267 N.E. 2d 11, 18 (App. 36).

its application in the *Droste* v. *Kerner* case (App. 36). Nevertheless, the Court of Appeals failed to either consider or give effect to the decisions of this Court that such a change of law compelled it to reverse and vacate the judgment below. The change in the law rendered at best the case only partially moot and the Court was bound to direct the District Court to enter such orders as will assure justice. Petitioner had filed an Emergency Motion on November 9, 1970, praying that the District Court judgment be reversed, that the case be remanded to assure prompt trial on the merits or such other orders as would advance the interests of justice in this case. *Duke Power Co.* v. *Greenwood,* 229 U.S. 259, 267, 268; *U. S.* v. *Munsingwear,* 340 U.S. 36, 39, 40.

In his Emergency Motion Petitioner argued that the *Paepcke* Opinion did not grant plaintiff's class any of the relief that they sought, the controversy over the validity of defendants leases had not been adjudicated, defendants had not tendered to plaintiff's class any of the relief they sought, there had been no state court action between the parties for nearly four years, and the action could not be maintained in the state courts for the state court judgment affirmed by the Appellate Court had found such suit to be multifarious. Moreover the controversies between plaintiff and his class were a continuing one in that defendants intended for the next nearly 90 years or longer to continue in their unlawful retention of the District leases and to deprive plaintiff's class as equitable owners of the property of their equitable interest therein.

Among the decisions supporting the plaintiff's motion was *Butler* v. *Eaton,* 141 U.S. 240, 242, 243, holding that an intervening state judgment in another related case required reversal of the judgment below. In *Blackman et al.* v. *Stone,* 300 U.S. 641, reversing 17 F. Supp. 102, the Court remanded for possible District Court action with respect

to remaining orders; and the right to amend following a change in state law was granted in *Bryan et al.* v. *Austin*, 254 U.S. 933.

Paepcke should be construed as confirming plaintiff's claims the special injury rule was arbitrary and unconstitutional. It did not however, terminate or decide his claim for relief, declare defendant's leases were illegal, require that they be reformed to include periodic redetermination of values and rentals or restore, in part, at least some of the enormous irreparable loss suffered by the public as a result of the terms of the leases.

Instead of recognizing the right of Plaintiff's class to benefits of the *Paepcke* decision under well established federal principles, the Court of Appeals inflicted a disastrous, unwarranted and unjust defeat upon them.

The absence of a pending state court action involving these defendants was the responsibility of the Defendants.

Under *United Mine Wkrs.* v. *Gibbs*, 383 U.S. 715, 726 the District Court should try this case for its justification "lies in considerations of judicial economy convenience and fairness to litigants."

This is true though a new state action[1] involving other lessees was recently filed in the state courts. Petitioner believes they, too, will produce technical delaying motions. Some of their pleadings are due before the date of respondent's briefs. Petition will refer to them in his reply.

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[1] See also *Watts* v. *Seward School Bd.*, 381 U.S. 126 and *Case* v. *Nebraska*, 381 U.S. 126 and *ICRR* v. *Olberding*, 346 U.S. 338, 214 F. 2d 91, 92-95 (CA 7) (1954).

[1] *Gendel et al.* v. *North American Car Corp. et al.*, Circuit Court of Cook County, 71 Ch. 2770. On August 17, 1971, Petitioner as one of counsel for plaintiffs, received a Motion to Dismiss from Defendant Freeport Sulphur Company on the claim of statute of limitations. It has an 8.57 acre lease running from 1960 to 2010 and currently pays annual rental of $1200. Its lease calls for annual rentals of $1200 for the first 20 years and revaluations later subject to increases of no more than 20%.

Defendants have gained a seven-year delay by their questionable conduct which at all stages comes under the category of unclean hands. The judgment below should be reversed and with directions that the case be sent back to the District Court for prompt trial and disposition before Judge Hubert L. Will. Only by combined federal and state court action in their separate cases can the public be assured of reasonable relief.

IV.

THE RULING PETITIONER WAS ESTOPPED FROM PRESENTING CONSTITUTIONAL ISSUES IS IN CONFLICT WITH THIS COURT'S CONTROLLING PRINCIPLES.

The Court of Appeals after assuming that federal jurisdiction might vest under plaintiffs equal protection claims held he was estopped from asserting such constitutional rights solely upon the authority of *Angel* v. *Bullington*, 330 U.S. 183, 189, 190. Plaintiff, the opinion said, failed to take his case to the Illinois Supreme Court and then if necessary to this Court. (440 F. 2d at p. 388).

No consideration was given to this Court's limited and conflicting application of *Angel*, the equitable nature of the estoppel doctrine, the controlling abstention principle or the cold realities contrasted with the hypothetical theories advanced in the opinion.

Looking first at realities, Judge Kerner overlooked that, while plaintiff's case was pending in the Appellate Court, he had successfully placed the weight of his office as Governor in favor of the rule accepted by the Illinois Supreme Court that Illinois taxpayers such as plaintiffs lacked standing to sue. Furthermore, his Attorney General, and U. S. Steel had also then successfully argued in this Court it should reject *Droste* appeal, for the special injury rule created no federal issues.

The utter hopelessness of the task suggested by Judge Kerner did not occur to him but it did to plaintiff who properly recognized that relief to the District taxpayers, if any, would come only in the federal courts.

The *Angel* opinion states its limited applicability to diversity cases and its inapplicability to federal and constitutional issues. (330 U.S. at p. 190). This view was confirmed by this Court, *First Nat. Bank* v. *United Air Lines,* 342 U.S. 396, 397 and other decisions.

There is no justification in the Court's opinion or otherwise for its refusal to consider or give effect to such well established and controlling principles. This Petition should therefore be allowed.

Estoppel is both an equitable and due process doctrine as was recently reaffirmed in *Blonder* v. *Univ. Foundation,* 28 L. Ed. 2d 788, 800 (1970), when the Court said "the requirement of determining whether the party against whom an estoppel is asserted had a full and fair opportunity to litigate is a most significant safeguard." No such opportunity was afforded to the 1,000,000 taxpayers in plaintiff's class and the Court of Appeals should not have accepted defendants' version of it.

The abstention doctrine is fundamental to the issue of federal versus state Court jurisdiction over federal constitutional issues. It is illustrated by *England* v. *Medical Examiners,* 375 U.S. 411, and *Zwickler* v. *Koota,* 389 U.S. 241. This doctrine though recognizing an element of discretion in the federal courts, must be applied consistently with the principle that Congress has imposed an absolute duty upon the federal Courts to decide federal constitutional disputes. Plaintiff's class were not deprived of their right to federal judicial determination of their constitutional claims because they litigated state issues in the state courts. The *England* decision supports this principle.

The continuing commitment of this Court to abstention is revealed in *Askew et al.* v. *Hargrove, et al.*, 28 L. Ed 196, 197, (1971). After a state suit was filed subsequent to the federal action, this Court applying abstention declared that federal action should be stayed for the state action "if sustained will obviate the necessity of determining the 14th Amendment questions." See also, *Wisconsin* v. *Constantineau*, 27 L. Ed. 2d 515.

In *Zwickler*, this Court declared the obligation of the federal courts at all levels to hear and decide constitutional claims requires them to "give due respect to a suitor's choice of a federal forum for the hearing and decision of its federal constitutional claims." (p. 248).

Here "resolution of the federal constitutional question is (not) dependent upon, or may be materially altered by, the determination of an uncertain issue of state law," *Harman* v. *Forsenius*, 380 U.S. 528, 534.

V.

THE NATURE OF THE PUBLIC INTEREST IN PUBLIC PROPERTY CONVERTED INTO PRIVATE PROPERTY SHOULD BE CONSIDERED BY THIS COURT.

The present suit is directed in part to recovery property from private corporations who by conduct tantamount to fraud have acquired it and converted it into their private property. Since *Crampton* v. *Zabriski*, 101 U.S. 601, 609 (1879), this Court has upheld taxpayers' interest in public monies to be direct and immediate with power to enjoin its misuse. Judge Will, 264 F. Supp. 467, 468 (1967), recognized the taxpayers equitable interest in public property held by General Dynamics as justifying standing under the due process clause.

The legal significance of public property held in trust is stated in the numerous decisions during the past 100

years in state and federal courts, in the laws enacted by states and in state constitutions. The nature of the responsibility of public officials holding property in trust for the public has been held to be similar to the duties of trustees for property privately owned. *Heilig Bros.* v. *Kohler*, 76 Atl.2d 613, 616, 617 (Sup.Ct.Pa., 1950). The highest standards of conduct have been imposed upon public trustees to assure the maximum possible return to taxpayers and the public as beneficiaries of public property held in trust. *Lassen* v. *Arizona*, 385 U.S. 458, 468, 469; (See also App. 69-72).

In *Herr* v. *Rudolph*, 25 NW 2d 916, 921, the North Dakota Supreme Court prohibited a public trustee from selling public property at private sale as taxpayers were deprived of the possibility of a greater income through competitive bidding. This claim was asserted a state statute exempting certain bidders from the requirements of a competitive bidding law violated the equal protection clause. See also, Raoul Berger, "Standing to Sue in Public Actions: Is It a Constitutional Requirement?" (Yale Law Jour. Vol. 78:5:Apr. 1969, 816-840).

The Court of Appeals' opinion holds upon the basis of *Owensboro* (200 U.S. 38), that federal courts have been reluctant "to interfere with the administration of municipal affairs." (440 F.2d p. 387, App. 3). He was in error in that: first, this Court has been consistently interfering with municipal and state action where, as here, federal issues are at stake. Second, this litigation was directed against the private corporations who by actions tantamount to fraud had acquired public property and converted it into private property. Thirdly, the District joined plaintiff in requesting the District Court to try this case.

Plaintiff's class possessed property interests within Amendment XIV.

VI.

PETITIONER'S CLAIM WAS FOUNDED ON A TRADITIONAL JOINT AND COMMON CLAIM.

Plaintiff's suit was directed against the recovery of equitable interests in property held by private corporations. It was a traditional joint and common claim. *Snyder* v. *Harris*, 394 U.S. 332. Judge Will's opinions so concluded: "The right asserted by plaintiff held in common by all members of his class." (264 F. Supp. 370. See also *Dierks* v. *Thompson*, 414 F.2d at p. 456). This Court of Appeals did not reach this issue (440 F.2d at. p. 388).

That such claims are true class actions (under the new Rule 23) was stated by Professor Charles A. Wright in his discussion of class actions, 47 FRD 169, 174, when he said:

> "Another familiar class suit is that in which one or more taxpayers of a community, suing on behalf of all, challenge the validity of a proposed public expenditure. It is difficult to believe that there has ever been such a case in which a good many of the taxpayers would not have preferred that their rights not be enforced, because of their interest in having the expenditure made. Yet no one has ever doubted the propriety of bringing such a suit as a class action."

Petitioner prays that this Court order the Court of Appeals to direct the District to set aside its ruling on this issue.

VII.

IMPORTANCE OF THE CASE.

This litigation is but another chapter in the public's battle to assure the protection of their interests in the constantly diminishing national, state and local land resources.[1]

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[1] This suit was instituted under the theory "to tell them (taxpayers) they must wait upon government action is often an effectual denial of the right for all time." This language was incorporated in 1970 in the opinion of the Illinois Supreme Court in *Paepcke et al* v. *P. B. C. et al.*, 263 NE2d 11, 18. (App. 36).

Here, the land at issue serves far greater national purposes than local for the majority of the corporate lessees acquired their long term interests because of its invaluable uses for interstate industrial commercial and transportation purposes.

In 1970 an exhaustive study of the nation's land resources was submitted to the President and Congress by the Public Land Law Review Commission, "One Third of the Nation's Land", in which it was stated in part:

> "While there may be some modest disposals, we conclude that at this time most public land would not serve the maximum public interest in private ownership." (p. 1)
>
> "Every landowner is concerned with the return that he receives for the use of his land or for the revenue he receives from the products produced on that land. United States citizens, collectively the owners of the public lands, are similarly concerned." (p. 3)

The 1970 Illinois 76th General Assembly Report of the Ill. State Senate Local Gov. Services Subcom. of the Mun. Corp. Comm. on this subject (Vol. II, Facts—Summary and Evaluation, "The Met. San. Dist. of Greater Chicago", (at p. 63 said in part):

> "Unfortunately the taxpayers of the Sanitary District had already suffered irreparable damage before these reforms were made, because most of the desirable land of the District was already under lease, and therefore only a few leases have been granted since that time." (App. 68)

The *Lemont* case has national significance beyond the constitutional and federal issues of due process, equal protection, personal rights, equitable estoppel, partial mootness, and the issue of Judge Kerner's disqualification. These additional factors include:

First, Petitioner seeks to determine proper standards and conditions primarily for future compensation and use

extending to 2050 or later for the invaluable public property. These standards embody periodic redetermination of rentals based upon changing market values. Ordinarily this is a legislative or administrative function but Article I, Sec. 10 prohibits retroactive legislative action.

Second, the occupation under lease or otherwise of vast areas of industrial and commercial use public land is not limited to Chicago; it covers metropolitan areas adjoining navigable waterways or otherwise, throughout the country.

Petitioner does not suggest the questionable circumstances here permeate all other areas. However, this is often a gray if not a dark area and the time is overdue to shed more light upon it. They too may benefit, if this Writ is allowed.

Third, the national interest is important, as has already been indicated. Large amounts of federal money has and will continue to be used to improve it.

Fourth, the state refused to assume its responsibility for the litigation for this case, and it is now properly within the jurisdiction of the federal courts who are uniquely qualified to deal with complex litigation such as this.

This Court as the ultimate guardian of the nation's constitutional rights has another opportunity to perform that function and to again serve the interest of the people of Illinois and the nation.

CONCLUSION

Petitioner prays that this Honorable Court grant this petition and enter a judgment reversing the final decree of the Court of Appeals with instructions that it direct the District Court set aside its judgment and set this cause for early trial.

Respectfully submitted,

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EXHIBIT 1

STATUTES

1254. COURTS OF APPEALS; CERTIORARI: APPEAL: CERTIFIED QUESTIONS

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; . . .

1331. FEDERAL QUESTION: AMOUNT IN CONTROVERSY: COSTS.

(a) The district court shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

1343. CIVIL RIGHTS AND ELECTIVE FRANCHISE

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person: . . .

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.

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In the Supreme Court of the United States

OCTOBER TERM, 1971

HARRY R. BOOTH,

Petitioner,

vs.

LEMONT MFG. CORP., et al.,

Respondents.

BRIEF OF RESPONDENTS LEMONT MFG. CORP., CECO STEEL PRODUCTS CORP., PUBLICKER CHEMICAL CORP., UNION TANK CAR CO. AND CORN PRODUCTS CO. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INDEX

	PAGE
I. Restatement Of The Case	1
The State Court Case	2
The Case At Bar	3
II. Reasons For Denying The Writ	6
I. Petitioner's Attack On Judge Kerner Is Unwarranted And Does Not Constitute A Basis For Granting Certiorari	6
A. Petitioner's Attack On Judge Kerner Is Totally Devoid of Merit	6
B. Petitioner's Afterthought Attack Is Barred By His Prior Invitation To Have Judge Kerner Participate	8
II. The Lower Courts Properly Determined That Petitioner's Claim Is Not Within The Jurisdiction Of The Federal Courts	9
A. Petitioner's Complaint Does Not Raise A Substantial Federal Constitutional Question	9
1. Leasing Of Municipal Real Estate At Inadequate Rentals Does Not Violate The Federal Due Process Rights Of Each Taxpayer	10
2. The Existence Of The Old Illinois Special Injury Rule Provides No Basis For Federal Jurisdiction Over Petitioner's Claim	10

B. The Jurisdictional Amount Requirement Of 28 U.S.C. § 1331 Is Applicable To Petitioner's Complaint And Is Not Satisfied 15

1. Section 1343(3) Cannot Be Invoked Here To Avoid The Jurisdictional Amount Requirement of Section 1331 15

2. Petitioner May Not Aggregate The Alleged Claims Of All Sanitary District Taxpayers In Order To Satisfy The Jurisdictional Requirement of Section 1331 17

Conclusion 18

AUTHORITIES CITED

PAGE

Statutes

28 U.S.C. § 455 ..... 7, 8

28 U.S.C. § 1331 ..... 3, 9, 15, 17

28 U.S.C. § 1343 ..... 3, 9, 15

Federal Rules of Civil Procedure, Rule 23 17

Cases

Adams v. U.S., 302 F.2d 307 (5th Cir. 1962) 8

Aetna Insurance Co. v. Travis, 259 P. 1068 (Kan. 1927) 7

Angel v. Bullington, 330 U.S. 183 (1947) 12

Booth v. General Dynamics Corporation, 264 F. Supp. 465 (N.D. Ill. 1967) 15

Booth v. Lemont Mfg. Corporation, 304 F. Supp. 235 (N.D. Ill. 1969) 3

Booth v. Lemont Mfg. Corporation, 440 F. 2d 385 (7th Cir. 1971) 5

Booth v. Metropolitan Sanitary District, 79 Ill. App. 2d 310, 224 N.E.2d 591 (1967) 2

Chance v. County Board of School Trustees, 332 F.2d 971 (7th Cir. 1964) 13

Cipriano v. City of Houma, 395 U.S. 701 (1969) 17

Dade County Board of Public Instruction v. Michigan Mutual Liability Co., 169 So. 2d 483 (Fla. 1964) ... 7

PAGE

Droste v. Kerner, 34 Ill. 2d 495, 217 N.E.2d 73 (1966), appeal dismissed, 385 U.S. 456 (1967) 4, 5, 6, 8, 9

Fuller v. Volk, 351 F.2d 323 (3rd Cir. 1965) 18

Gendel and Booth v. North American Car Corp., No. 71 CH 2770 (Circuit Court of Cook County, filed June 18, 1971) 14

General Tire & Rubber Company v. Watkins, 363 F.2d 87 (4th Cir. 1966), cert. denied, 385 U.S. 899 7

Hague v. C.I.O., 307 U.S. 496 (1939) 16

Hornbeak v. Hamm, 283 F. Supp. 549 (M.D. Ala. 1968), *aff'd per curiam,* 393 U.S. 9 (1968) 16

Kramer v. Union Free School Dist., 395 U.S. 621 (1969) 17

Louisville & Nashville R. R. v. Mottley, 211 U.S. 149 (1908) 13

Metcalf v. Watertown, 128 U.S. 586 (1888) 13

Neil v. U.S., 205 F.2d 121 (9th Cir. 1953) 7

Norris v. Mayor and City Council of Baltimore, 78 F. Supp. 451 (D. Md. 1948) 13

Otto v. Somers, 332 F.2d 697 (6th Cir. 1964), cert. denied, 379 U.S. 1002 (1965) 10

Owensboro Waterworks Co. v. Owensboro, 200 U.S. 38 (1906) 10

Paepcke v. Public Building Commission, 46 Ill. 2d 330, 263 N.E.2d 11 (1970) 11, 14

PAGE

Pan American Petroleum Corp. v. Superior Court, 366 U.S. 656 (1961) 13

Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923) 12

Scott v. Frazier, 253 U.S. 243 (1920) 17

Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667 (1950) 13

Snyder v. Harris, 394 U.S. 332 (1969) 17

Tennessee v. Union & Planters' Bank, 152 U.S. 454 (1894) 13

Thomas v. U. S., 363 F.2d 849 (9th Cir., 1966) 8

Tomiyasu v. Golden, 358 F.2d 651 (9th Cir. 1966) 12

U. S. v. Hetherington, 279 F.2d 792 (7th Cir. 1960) 8

Vraney v. County of Pinellas, 250 F.2d 617 (5th Cir. 1958) 18

Miscellaneous

H. Hart and H. Wechsler, The Federal Courts and the Federal System 763 (1953) 13

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To the Honorable, The Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Respondents pray that the Writ of Certiorari be denied.

I. RESTATEMENT OF THE CASE

Petitioner's statement of the case is a confusing conglomeration of references to pleadings and judicial opinions in numerous cases and miscellaneous assertions of fact or opinion. The controlling facts, however, are simple. They involve this case and petitioner's earlier lawsuit in the Illinois state courts against the respondents (hereinafter "the state court case").

The State Court Case.

In 1963, petitioner, suing solely as a taxpayer, brought an action in the Circuit Court of Cook County, Illinois, against the Metropolitan Sanitary District of Greater Chicago ("Sanitary District"), an Illinois municipal corporation, and a number of business corporations (including all but one of respondents here) which had leased land from the Sanitary District under long-term leases. The complaint contended that the leases were invalid and that the past and future rentals under those leases were grossly inadequate. Motions to dismiss were filed. The judge, after extensive argument, dismissed petitioner's amended complaint. (App. p. 30). The principal ground for this decision was that petitioner, as a taxpayer, had no cause of action under Illinois law because he had not suffered any injury different in kind or degree from that suffered by all other members of the public—the Illinois so-called "special injury rule."*

On appeal, the dismissal was affirmed by the Illinois Appellate Court. *Booth* v. *Metropolitan Sanitary District*, 79 Ill. App. 2d 310, 224 N.E. 2d 591 (1967). The Appellate Court agreed with the trial judge that petitioner had no cause of action under Illinois law.

At no time during the pendency of the state court action did petitioner assert either that his attacks on the Sanitary District leases were predicated in part upon the Federal Constitution, or that the Illinois "special injury rule" violated the Federal Constitution. After losing in the Illinois Appellate Court, petitioner did not seek further review

* At later stages of the proceedings petitioner admitted that the judge had correctly interpreted and applied Illinois law in his decision.

of the case in the Illinois Supreme Court or in the United States Supreme Court.

The Case At Bar.

Almost two years later, on November 20, 1968, petitioner commenced the pending litigation in the Federal District Court in Chicago. His complaint again joined the Sanitary District and the respondent lessees, and again attacked the same lease transactions which had been attacked in the state court action, on the same grounds, *i.e.*, that the leases were invalid and did not result in adequate past or future rental to the Sanitary District. There were only two material changes from the complaint filed in petitioner's state court action. First, petitioner's federal complaint added a separate count which sought a declaratory judgment invalidating an additional 75 or more leases held by persons or corporations which were not made parties-defendant. Second, the complaint now asserted that the lease transactions and the Illinois "special injury rule" violated petitioner's constitutional rights of due process and equal protecton of the laws, and that the federal court had jurisdiction of the action under 28 U.S.C., §§ 1331 and 1343(3).

After petitioner was twice permitted to amend his complaint, Chief Judge Robson granted defendants' motions to dismiss on the grounds that the court lacked subject matter jurisdiction because the complaint failed to raise any substantial federal question, and that the $10,000 jurisdictional amount requirement of 28 U.S.C. §1331 was applicable and not satisfied. Because of its ruling, the Court did not reach defendants' arguments that petitioner's claims were barred by *res judicata* and collateral estoppel. *Booth* v. *Lemont Mfg. Corporation*, 304 F. Supp. 235 (N.D. Ill. 1969).

Petitioner appealed. After briefs had been filed, petitioner filed a so-called "emergency motion," requesting immediate reversal and a hearing *en banc*. The motion was denied. In his emergency motion, petitioner specifically referred to the fact that the Honorable Judge Otto Kerner of the Court of Appeals had been named as a defendant (in his then official capacity as Governor of Illinois) in prior litigation which had involved the Illinois "special injury rule" and which respondents had cited as a precedent. *Droste* v. *Kerner*, 34 Ill. 2d 495, 217 N.E. 2d 73 (1966), *appeal dismissed*, 385 U.S. 456 (1967). Not only did petitioner fail to suggest that Judge Kerner should disqualify himself but petitioner's motion encouraged Judge Kerner to participate in the *en banc* hearing petitioner was requesting. The following is a complete quotation of the portion of petitioner's "emergency motion" which relates to this subject:

> "The Lessee-Defendants and Plaintiff have generally agreed that one of the leading cases bearing upon this litigation has been the case of *Droste* v. *Kerner*, 34 Ill. 2d 495, in which Judge Kerner of this Court became a defendant in his capacity as Governor of Illinois. In the same capacity, and during his distinguished service as Governor, he also approved various changes in the District laws relating to its leases and other phases of its operations. *Such facts should not, of course, stand as a barrier to a hearing en banc upon this appeal, should this Court look with favor upon the plaintiff's suggestion.*" (Emphasis supplied.) (Motion of plaintiff-appellant, filed November 11, 1970, para. 8, p. 6.)

After oral argument, the Court of Appeals on January 28, 1971, issued an opinion, written by Judge Kerner, which sustained Judge Robson's dismissal of the complaint. The Court of Appeals rejected, as a matter of law, petitioner's

contention that the leasing of municipal real estate for inadequate rentals would deprive individual taxpayers of property without due process of law. The Court of Appeals did not reach the issue of whether the Illinois "special injury rule" violated any procedural due process or equal protection rights of petitioner, since it concluded that petitioner's failure to appeal the dismissal of his prior state court action to the Illinois Supreme Court and, if necessary, to this Court, had estopped him from claiming that he had been the victim of the application of an unconstitutional rule of law in that prior litigation. Since these rulings amply supported affirmance, the Court of Appeals did not reach the other grounds for affirmance which had been argued by respondents. *Bo[illegible]* v. *Lemont Mfg. Corporation*, 440 F. 2d 385 (7th Cir. 1971).

Petitioner sought rehearing *en banc*, asserting for the first time that Judge Kerner should have disqualified himself from participating in the case because he had been named party-defendant in *Droste* v. *Kerner*. (App. p. 50). On March 29, 1971, the Court of Appeals denied the motion for rehearing in an order which recited that not one of the judges on the entire court had voted to grant the petition. (App., p. 6).

II. REASONS FOR DENYING THE WRIT

I.

Petitioner's Attack On Judge Kerner Is Unwarranted And Does Not Constitute A Basis For Granting Certiorari.

A. Petitioner's Attack On Judge Kerner Is Totally Devoid Of Merit.

Petitioner's argument that Judge Kerner should have disqualified himself is without merit. Petitioner's objection is predicated solely upon the fact that Judge Kerner was named as a nominal defendant in an action which was cited as a precedent by the defendants—though it was not cited in the opinion of the Court of Appeals. The case was *Droste* v. *Kerner,* 34 Ill. 2d 495, 217 N.E. 2d 73 (1966), *appeal dismissed,* 385 U.S. 456 (1967). In that case a taxpayer attacked the constitutionality of a statute which conveyed title to submerged public land to United States Steel Corporation. Judge Kerner (then Governor of Illinois) and the Illinois Secretary of State were among those made defendants in their official capacities, as persons with responsibilities relating to carrying out the conveyance contemplated by the statute. Both were defended by the State Attorney General, who supported the constitutionality of the statute. There can be no dispute that Judge Kerner had no personal interest in that case, that he was threatened with no personal liability, and that he was made a defendant in his official capacity solely to create a procedural situation in which the constitutionality of the statute could be properly attacked.

These facts could not conceivably give rise to any valid motion which would require Judge Kerner to disqualify himself. The sole statutory basis for disqualification of

a United States Court of Appeals Judge appears in 28 U.S.C. §455 which states:

> "Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein."

Even petitioner does not claim that Judge Kerner has an interest, has been of counsel or a witness or is related to or connected with any party or his attorney *in this litigation.* Petitioner's sole claim is that Judge Kerner was a nominal party in another case upon which petitioner relies to establish the legal principle which he contends entitles him to relief in this case. No authority is required to establish that a judge is not subject to disqualification merely because he acted as counsel or was a party in prior litigation which is relied upon as precedent in the case before the judge. "Interest" in a proceeding, whether at common law or in the above statute, refers not to an interest in a similar suit or to interest in a point of law as such but rather to a stake in the direct outcome of the particular case. Indeed, the law is clear that a judge is not disqualified even if he was a nominal party or was otherwise involved in an official capacity in earlier stages of the same litigation. *General Tire & Rubber Company* v. *Watkins,* 363 F. 2d 87 (4th Cir. 1966); *Neil* v. *U.S.,* 205 F. 2d 121 (9th Cir. 1953); *Dade County Board of Public Instruction* v. *Michigan Mutual Liability Company,* 169 So. 2d 483 (Fla. 1964); *Aetna Insurance Company* v. *Travis,* 259 P. 1068 (Kan. 1927). In three of the above cited cases the judge had been a nominal party or attorney in the *same* case which he was allowed to hear. Judge Kerner was a nominal party in an entirely different and unrelated case

in which he had no stake. Petitioner has made no showing that Judge Kerner was in any manner biased. Indeed, it is obvious that Judge Kerner's having been named a nominal party in his capacity as Governor in the *Droste* litigation could not result in his possessing a personal interest in that case which might give rise to a charge of bias in this case.

B. Petitioner's Afterthought Attack Is Barred By His Prior Invitation To Have Judge Kerner Participate.

There can be no question that failure to make timely objection when a party believes a judge is subject to disqualification pursuant to 28 U.S.C. §455 constitutes waiver of any such objection. *Thomas* v. *U.S.*, 363 F.2d 849 (9th Cir. 1966); *Adams* v. *U.S.*, 302 F.2d 307 (5th Cir. 1962); *U.S.* v. *Hetherington*, 279 F.2d 792 (7th Cir. 1960). Here petitioner's frivolous objection was not even timely raised. Indeed, petitioner effectively invited Judge Kerner to participate in this case. Prior to oral argument, petitioner filed a so-called "emergency motion," seeking a hearing *en banc* and other relief. In one paragraph of this motion, petitioner specifically referred to Judge Kerner's role as a defendant in *Droste* v. *Kerner*. Petitioner then stated:

> "Such facts should not, of course, stand as a barrier to a hearing *en banc* upon this appeal, should this Court look with favor upon the plaintiff's suggestion." (Motion of plaintiff-appellant, filed November 11, 1970, para. 8, p. 6.)

Obviously, this statement operated as a waiver of the objection now raised by petitioner. Indeed, it is difficult to see that the inclusion of this statement and the reference to *Droste* v. *Kerner* in petitioner's motion could have any meaning other than as an intentional waiver of the objection which petitioner now belatedly asserts.

Petitioner's "emergency" motion was denied. At oral argument, petitioner referred again to Judge Kerner's status as a defendant in *Droste* v. *Kerner,* but made no objection to his participation. Petitioner was given leave to submit additional authorities after oral argument. He did so in a letter, dated November 26, 1970, which makes no objection to Judge Kerner's participation. Indeed, petitioner's objection was raised for the first time in his petition for rehearing—after he had discovered that Judge Kerner had not voted to decide the case in his favor. The authorities establish that petitioner, by his conduct, has waived the type of technical disqualification objection which he now asserts.

II.

The Lower Courts Properly Determined That Petitioner's Claim Is Not Within The Jurisdiction Of The Federal Courts.

Essentially, the lower courts held that the nature of petitioner's complaint—dissatisfaction with the financial returns on leases of municipal real estate—did not fall within the limited subject matter jurisdiction of the federal district courts. This conclusion is clearly correct on either of two independent grounds: First, that the complaint does not raise any substantial federal constitutional claim; and second, that the $10,000 jurisdictional amount requirement of 28 U.S.C. §1331(a) is applicable and has not been satisfied. These two grounds will be discussed in Sections A and B, *infra.*

A. Petitioner's Complaint Does Not Raise A Substantial Federal Constitutional Question.

Under either Section 1331 or Section 1343 of the Judicial Code, the two jurisdictional sections relied upon by petitioner, it is necessary that the complaint raise a substan-

tial question under the Constitution or laws of the United States. Petitioner asserts various theories based upon the due process and equal protection clauses of the Fourteenth Amendment. However, the lower courts correctly determined that these theories were insubstantial and, further, that petitioner was estopped from asserting them by reason of his conduct in the prior state court litigation.

1. Leasing Of Municipal Real Estate At Inadequate Rentals Does Not Violate The Federal Due Process Rights Of Each Taxpayer.

One of petitioner's theories asserts that any lease or contract involving municipal property which a taxpayer believes does not produce an "adequate" or "fair" return or benefit to the municipality, or which contains other terms not sufficiently favorable to the municipality, permits any municipal taxpayer to seek redress in the federal courts on the ground that he, as a taxpayer, has been deprived of "property" without due process of law. As the lower courts properly concluded, this sweeping proposition is utterly unsound, and its acceptance would result in the wholesale transfer of disputes concerning the management of municipal property or the disbursement of municipal funds to the federal courts. *Otto* v. *Somers*, 332 F. 2d 697, 699-700 (6th Cir. 1964), *cert. denied*, 379 U.S. 1002 (1965); *Owensboro Waterworks Co.* v. *Owensboro*, 200 U.S. 38, 45-46 (1906).

2. The Existence Of The Old Illinois Special Injury Rule Provides No Basis For Federal Jurisdiction Over Petitioner's Claims.

Petitioner's second and principal constitutional theory is an argument that procedural due process and equal protection of the laws require state recognition of local tax-

payers' actions challenging the legality or propriety of conveyances or leases of municipal real estate, and that a state court's failure to recognize a taxpayer's action in such circumstances deprives the suing taxpayer of a Fourteenth Amendment "right to be heard" and permits him to maintain a subsequent action on the same claims in the United States District Courts.

It is undisputed that Illinois courts formerly applied a "special injury rule" which barred individual members of the public or taxpayers, as such, from judicially attacking the validity of leases or conveyances of municipal real estate, or from seeking to prevent alleged improper use of such real estate. Under this Illinois rule, lawsuits in those categories could be maintained by a number of appropriate public officials, or by citizens (such as adjoining land-owners) who suffered special injury because of the alleged misuse of the municipal real estate, different from the injuries suffered by the public at large. It is also undisputed that this special injury rule was overruled on policy grounds by the Illinois Supreme Court in *Paepcke* v. *Public Building Commission*, 46 Ill. 2d 330, 341, 263 N.E. 2d, 11, 18 (1970). As the lower courts properly held, however, these facts do not sustain petitioner's complaint in this action. There are several reasons for this conclusion.

First, as the Court of Appeals properly held, petitioner's attempt to complain *in this action* that the dismissal of his prior state court litigation violated the Federal Constitution, constitutes a flagrant attempt at piecemeal litigation which does not give rise to federal jurisdiction and is barred by *res judicata* and collateral estoppel. The law is clear that a plaintiff may not divide up a single cause of action by proceeding first in the state court on state law theories, and then starting a new action on the same facts

in the federal district court based on federal constitutional theories. The proper method for petitioner to have vindicated his so-called "right to be heard" on the alleged unconstitutionality of the Illinois special injury rule would have been to have raised that constitutional argument in the Illinois trial court and appellate court which dismissed his state court complaint, and to have appealed from the adverse decisions first to the Illinois Supreme Court and then to this Court.

This Court's decision in *Angel* v. *Bullington,* 330 U.S. 183, 189-190 (1947) is precisely in point. In that case the plaintiff's state court action for a deficiency judgment was dismissed because the state law did not recognize actions for a deficiency judgment. The plaintiff in that case, like petitioner here, did not appeal to the United States Supreme Court, but instead instituted a new action in the federal district court. Unlike petitioner here, the plaintiff in that case could assert the existence of diversity of citizenship as a basis for federal jurisdiction. However, he also asserted that the state court's refusal to recognize actions for deficiency judgments violated his federal constitutional rights. This Court refused to sanction Mr. Bullington's attempt at piecemeal litigation, holding that his constitutional claims were barred by *res judicata* because he had failed to assert and press them in his earlier state court action.

Contrary to petitioner's suggestions, this principle is not novel, but has been applied in many cases. Its abandonment would encourage the multiplication of piecemeal litigation, and would permit a plaintiff to institute a new lawsuit on the same cause of action every time he could devise a new legal theory. *Tomiyasu* v. *Golden,* 358 F. 2d 651 (9th Cir. 1966); *Rooker* v. *Fidelity Trust Co.,* 263 U.S. 413 (1923); *Norris* v. *Mayor and City Council of Bal-*

timore, 78 F. Supp. 451, 463 (D. Md. 1948); *Chance* v. *County Board of School Trustees,* 332 F. 2d 971 (7th Cir. 1964).

Second, petitioner's complaint of the alleged unconstitutionality of the Illinois special injury rule cannot "bootstrap" him into the United States District Court. Obviously, there is no general federal jurisdiction to challenge any and all unconstitutional rules of state law. The controversy presented by the complaint must itself raise a constitutional issue. As we have already noted, petitioner cannot predicate federal jurisdiction upon the dismissal of his earlier state court litigation, since his remedy for that dismissal lay in appeals to the Illinois Supreme Court and to this Court—a remedy which he deliberately ignored. In the pending litigation, neither of the lower courts has applied or relied upon the special injury rule. Consequently, petitioner's invocation of that rule here amounts at most to a speculation that defendants might rely upon it as a defense at some stage of the proceedings.* However, decisions of this Court have definitively established that an action is not based upon federal law for jurisdictional purposes merely because the plaintiff anticipates that some allegedly unconstitutional defense will be raised to his claim. *Skelly Oil Co.* v. *Phillips Petroleum Co.,* 339 U.S. 667 (1950); *Louisville & Nashville R.R.* v. *Mottley,* 211 U.S. 149 (1908); *Tennessee* v. *Union & Planters' Bank,* 152 U.S. 454 (1894); *Metcalf* v. *Watertown,* 128 U.S. 586 (1888); H. Hart and H. Wechsler, *The Federal Courts and the Federal System* 763 (1953); *cf. Pan American Petroleum Corp.* v. *Superior Court,* 366 U.S. 656 (1961).

Third, an additional persuasive reason for rejecting petitioner's plea that Illinois taxpayers have no remedy, save

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* Obviously, such speculation is ill founded, since the special injury rule has been abolished by the Illinois Supreme Court and no longer exists even in Illinois.

in the federal courts, is found in the Illinois Supreme Court's recent abolition of the special injury requirement. *Paepcke* v. *Public Building Commission*, 46 Ill. 2d 330, 341, 263 N.E. 2d, 11, 18 (1970). Apparently, therefore, Illinois taxpayers now have standing to maintain in Illinois courts lawsuits on the type of claim which petitioner is attempting to assert. Indeed, one of petitioner's relatives, as a taxpayer, has instituted a new lawsuit in the Illinois courts, challenging a number of other leases of Sanitary District real estate. *Gendel and Booth* v. *North American Car Corp.*, No. 71 CH 2770 (Circuit Court of Cook County, filed June 18, 1971). Under these circumstances, petitioner's attack on the constitutionality of the special injury rule is moot.*

Fourth, petitioner's attack on the constitutionality of the special injury rule is utterly devoid of merit. Petitioner can cite no case which has held that a state is constitutionally required to recognize taxpayer lawsuits to redress "public" injuries, *i.e.*, those in which the alleged injury of the plaintiff is identical to the injury suffered by every other member of the public, or that it is an unconstitutional choice for a state to vest the exclusive right to complain in such cases in appropriate public officials. Indeed, even Judge Will, who declined to dismiss petitioner's

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* Of course, it is respondents' position that petitioner's own claim as a taxpayer is barred by *res judicata* because of the final judgment in his prior state court litigation. While petitioner has dramatically asserted that the question of the right of all other taxpayers to sue is dependent upon the outcome of this litigation, that claim is nonsense. The only *res judicata* question presented in this case is whether *petitioner's* claim is barred by the prior state court judgment against him. The effect, if any, of the prior state court judgment upon actions by taxpayers other than petitioner would be litigated in those actions and would be wholly unaffected by this case.

earlier federal court action against General Dynamics Corporation, rejected petitioner's attack, on equal protection grounds, upon the constitutionality of the Illinois special injury rule. *Booth* v. *General Dynamics Corporation*, 264 F. Supp. 465, 468-469 (N.D. Ill. 1967).

B. The Jurisdictional Amount Requirement Of 28 U.S.C. §1331 Is Applicable To Petitioner's Complaint And Is Not Satisfied.

In addition to asserting a substantial claim arising under the Constitution or laws of the United States, petitioner must either satisfy the $10,000 jurisdictional amount requirement of 28 U.S.C. §1331 or successfully invoke federal jurisdiction under a special provision of the Judicial Code which does not contain a jurisdictional amount requirement. Petitioner argues, in the alternative, that his claim constitutes a civil rights claim under 28 U.S.C. §1343(3) (which requires no jurisdictional amount), or that the alleged claims of all taxpayers relating to the challenged leases can be aggregated to satisfy the jurisdictional amount requirement of Section 1331. Since neither of these alternative theories has merit, petitioner's failure to satisfy the applicable jurisdictional amount requirement constitutes an additional, independent ground for the dismissal of his complaint.

1. Section 1343(3) Cannot Be Invoked Here To Avoid The Jurisdictional Amount Requirement of Section 1331.

The lower courts correctly held that, apart from its failure to raise a substantial constitutional question, petitioner's complaint did not invoke federal jurisdiction under 28 U.S.C. §1343(3) because the complaint alleged deprivation of property rights, rather than the "personal right" type of civil rights claim intended to be covered by Sec-

tion 1343. Petitioner questions the validity of the property right-personal right distinction. However, the rule that property right claims do not fall within Section 1343(3) was originally enunciated by this Court in *Hague* v. *C.I.O.*, 307 U.S. 496, 508 (1939), and has been recently reaffirmed in a *per curiam* decision which petitioner does not even bother to cite. *Hornbeak* v. *Hamm*, 283 F. Supp. 549 (M.D. Ala. 1968), *aff'd. per curiam*, 393 U.S. 9 (1968).

Petitioner also seems to argue that his claim is not based upon "property rights" because he asserts a right of procedural due process and equal protection of the laws. This claim cannot withstand analysis. Virtually every complaint challenging state action on federal constitutional grounds is based upon the Fourteenth Amendment, and therefore asserts a denial of due process or equal protection of the laws. The property right-personal right distinction does not depend upon the particular language of the Fourteenth Amendment relied upon, but rather upon the analysis of whether the interests alleged to be infringed are property interests. That petitioner's complaints of inadequate rentals from municipal leases constitute "property" rather than "personal" claims, is too clear to require further discussion. An argument similar to that made by petitioner was rejected in *Hornbeak* v. *Hamm*, 283 F. Supp. 549 (M.D. Ala. 1968), *aff'd. per curiam*, 393 U.S. 9 (1968), in which the plaintiff had alleged a denial of due process and equal protection because of a lack of uniformity of property evaluation and assessment under the Alabama taxing statute. The three-judge district court in that case made the following statement which is equally dispositive of plaintiff's claims here:

> ". . . [E]xistence of an equal protection question does not supply federal jurisdiction under §1343. Not every claim of constitutional violation is a 'civil right'

under the statutes. The complaint in this case avers a denial by the defendants of due process and equal protection under the 14th Amendment. However, since we hold the complaint alleges only a 'property right' not a 'civil right' under §1343 the complaint fails to allege any basis for federal jurisdiction since it does not aver the jurisdictional amount of $10,000 or more under §1331. Therefore, we do not reach the merits of the issue of whether the Alabama procedures attacked by the complaint in fact do or do not violate the 14th Amendment." 283 F. Supp. at 554.

Petitioner's reliance upon *Cipriano* v. *City of Houma*, 395 U.S. 701 (1969) and *Kramer* v. *Union Free School Dist.*, 395 U.S. 621 (1969) is misplaced. Each of those cases involved limitations on the right to vote—obviously a "personal right," and one of particular importance in our democratic society.

2. Petitioner May Not Aggregate The Alleged Claims Of All Sanitary District Taxpayers In Order To Satisfy The Jurisdictional Requirement Of Section 1331.

It is undisputed that the $10,000 jurisdictional amount requirement of Section 1331 could be considered satisfied only if petitioner were permitted to aggregate the alleged claims of all taxpayers of the Sanitary District. The law is clear that the aggregation petitioner seeks is improper.

This Court's recent decision in *Snyder* v. *Harris*, 394 U.S. 332 (1969), held that claims in class actions can be aggregated under the new Rule 23 F.R.C.P. only if they have traditionally been subject to aggregation under the case law established by the federal courts. It is clear that municipal taxpayer claims, including those seeking to enjoin an allegedly illegal and unconstitutional public expenditure of funds, are not subject to aggregation. *Scott* v. *Frazier*, 253 U.S. 243, 244 (1920); *Vraney* v. *County of*

Pinellas, 250 F. 2d 617, 618 (5th Cir. 1958); *Fuller* v. *Volk*, 351 F. 2d 323, 327-328 (3rd Cir. 1965) and cases cited therein.

CONCLUSION

For the foregoing reasons, the petition for the issuance of a writ of certiorari should be denied.

Respectfully submitted,

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SUPREME COURT, U. S.

No. 264

In the Supreme Court of the United States

OCTOBER TERM, 1971

HARRY R. BOOTH,

Petitioner,

vs.

LEMONT MFG. CORP., CECO STEEL PRODUCTS CORP., PUBLICKER CHEMICAL CORPORATION, AMERICAN OIL CO., UNION TANK CAR CO., CORN PRODUCTS CO., METROPOLITAN SANITARY DISTRICT OF GREATER CHICAGO,

Respondents.

PETITIONER'S REPLY TO BRIEF OF AMERICAN OIL COMPANY

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TABLE OF CONTENTS

PAGE

1. Neither The Facts Of Record Or Controlling Principles Permit Application of Res Judicata or Estoppel. (Resp. Br. pp. 2, 8-10) 1

   a. Judge Will Recognized as Substantial Plaintiff's Claim the Same State Court Judgment Lacked Due Process and Was Tainted with Fraud 2

   b. The Intervening Illinois Supreme Court Repudiation of the Special Injury Principle Barred Application of Res Judicata or Estoppel 4

A. Respondent Claims No Substantial Federal Question Arises Under Illinois Law (Resp. pp. 2, 3) .. 7

B. Respondent Errs in Its Claim No Federal Question Existed (Resp. pp. 4, 5) 7

C. The Claim the Jurisdictional Amount Required under 28 U.S.C. 1331 Is Not Present (Resp. pp. 6, 7) 8

D. Respondent errs in arguing There Is No Federal Jurisdiction Under 28 U.S.C. 1343(3) (Resp. p. 7) 9

Conclusion 9

Corrections in Petition per letter of September 7, 1971 to counsel for Respondents ..... App. 1

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Respondents.

PETITIONER'S REPLY TO BRIEF OF AMERICAN OIL COMPANY

To the Honorable, The Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

1. Neither The Facts Of Record Or Controlling Principles Permit Application of Res Judicata or Estoppel. (Resp. Br. pp.2, 8-10)

1. Respondent argues res judicata and seeks to support the Court of Appeals estoppel ruling though the decisions

of this and other federal courts do not permit the application of either where as here

(a) the state court judgment lacked due process and was tainted with fraud (CA App. 123-130)

(b) Judge Will refused to give effect to the same judgment because of such charges and held a hearing on the facts was required (App. 22)

(c) the intervening change in the law eliminated the special injury rule underlying the state judgment (App. 36)

(d) the State hearing did not include even remote consideration or determination of the merits supporting the illegal inclusion of the terms "with prejudice" (CA Supp. Vol. I, pp. 116, 117, 146, 147, 150-160; CA App. 117, App. 24-32) and

(e) the judgment insofar as it was predicated upon multifariousness (Resp. Br. p. 8) obviously should not bar subsequent suits against any individual lessee but the absence of the right to join more than one of the 75-100 lessees deprived Illinois taxpayers of a due process remedy in the state courts and requires trial of this case in the federal courts.

a. Judge Will Recognized as Substantial Plaintiff's Claim the Same State Court Judgment Lacked Due Process and Was Tainted with Fraud.

Motions to Dismiss based upon the claim the same state court judgment was res judicata were presented in the *General Dynamics* case by Dynamics and the Sanitary District. In response to Dynamics' Motion, Petitioner filed with the District Court a seven-page motion for discovery of facts in opposition to Dynamics' Motion on the ground judgment was collusive and a fraud. This identical pleading was incorporated in the District Court record in the *Lemont* case supported by Petitioner's Affidavit. It is to

be found in the Court of Appeals Appendix and filed here (CA App. 123-130.)

Petitioner's claim the state court judgment lacked due process rested upon several factual allegations including the following:

(1) The Circuit Court chancellor, Cornelius J. Harrington, refused to disqualify himself though his son, Cornelius J. Harrington Jr., was a partner in the Kirkland firm which has consistently represented American Oil Co. in these state and federal court suits. (C.A. App. 129, Vol. I, C.A. App. Supp. 83-86).[1] The absence of impartiality is shown by his dismissal "with prejudice" though he never ruled upon or even considered any of the factual allegations in the 100 page complaint or was concerned about the vast important public issues and public losses involved in the litigation.

(2) Petitioner also contended the Sanitary District and its then president Frank Chesrow supported the corporate

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[1] In his Illinois Appellate Court Brief Petitioner relied among other things upon the following authorities *State* v. *Miller*, 94 So. 2d 661, 662 (Sup. Ct. La.) (1957); *State* v. *Deutsch*, 168 Atl. 2d 12, 233 (Sup. Ct. N.J.) (1961). There the court held:

> "Members of the present New Jersey Supreme Court have disqualified themselves whenever a close relative such as a brother or son was of counsel and they have followed the same wholesome course in instances where the close relative was a law partner of counsel appearing for a private or public litigant."

At page 23 in a footnote it states that in *Spagnuolo* v. *Barnett*, 109 A. 2d 623 (1954) Chief Justice Vanderbilt disqualified himself in a case where an attorney appeared before the Court who was a law partner of his son and he did the same in *Essex County* v. *Hundelag*, 132 A. 2d 807 (1957). See also *Oakley* v. *Aspinwall, et al.*, 3 Comst. 547, 549, 550, 1850).

defendants' motions to dismiss because Dynamics officers were engaged in a joint financial venture with Chesrow. Subsequently it appeared certain federal court records referred to in the motion it disclosed that the then key officer of Dynamics had guaranteed and in fact subsequently paid the more than $2,500,000 bank loan Chesrow and other associates had contracted to pay as principals. (CA App. 125-128)

At the time Judge Will wrote his opinion upholding federal subject matter jurisdiction 264 F.Supp. 465 (1967) (App. 10-17) Dynamics motion was before him. In view of his judgment overruling Dynamics motion to dismiss, it is obvious he did not sustain the res judicata argument. In fact when same res judicata point was presented by the Sanitary District in its motion to dismiss, Judge Will (App. 21, 22) expressly overruled it stating:

> ". . . The issue of whether plaintiff's instant action is barred by res judicata cannot be decided without a hearing on factual issues. Plaintiff claims that the state court judgment which the Sanitary District asserts bars this action was obtained by fraud. . . ." (p. 22)

b. The Intervening Illinois Supreme Court Repudiation of the Special Injury Principle Barred Application of Res Judicata or Estoppel.

This Court's landmark ruling in *C.I.R.* v. *Sunnen,* 333 U.S. 591, 597, subsequent to the decision in the *Angel* case 330 U.S. 183 expressly holds that an intervening change of legal principles prevents a federal court from giving effect to the doctrine of res adjudicata. The state's special injury rule was overruled by the Illinois Supreme Court in 1970 in *Paepcke et al.* v. *P.B.C. et al.,* 263 NE 2d 11, 18 (App. 36). (See 440 F2d 386 Fn 2 (App. pp. 2 & 36)

In *Sunner* this Court said pp. 600, 601,

> "As demonstrated by Blair v. Commissioner, 300 U.S. 5, 9, 81 L ed 465, 469, 57 S Ct. 330, a judicial declaration intervening between the two proceedings may so change the legal atmosphere as to render the rule of collateral estoppel inapplicable. But the intervening decision need not necessarily be that of a state court, as it was in the Blair Case. . . . *In either event, the supervening decision cannot justly be ignored by blind reliance upon the rule of collateral estoppel.*" (Cases cited). (And see Petition pp. 19-22)

The Court of Appeals disregarded this Court's warning against blind adherence to estoppel (440 F2 at p. 388 App. 4)

The Kerner opinion likewise fails to even mention the fact that the Lemont suit was filed on November 20, 1968 more than nine months after the Court of Appeals on February 9, 1968 refused to order Judge Will to dismiss the Dynamics action. Plaintiff had a right to pursue his federal remedies since that Court then surely held that the federal issues were of such substance as to require a trial (App. 23). In this respect, at least, it agreed with Judge Will.

Respondent's reliance upon the July 2, 1971 *Phillips* v. *Shannon et al.* decision (pp. 9, 10) is misplaced. The Court of Appeals noted that the District Court had given effect to res judicata, but here the only District Judge who considered federal res judicata and estoppel principles was Judge Will. He overruled such contentions by defendants and held that the plaintiff's claim such judgment was a fraud and required a factual hearing. Judge Kerner did not explain his failure to even mention the prior rulings by his Court or the District Court in *General Dynamcs.*

The issue in *Phillips* was simply his right to a permit to the boat used and a particular "boat stall" and not a public action class suit. Furthermore the dismissal of his complaint by the Illinois court was not predicated on a general rule of law denying access to the Illinois courts of 99% or more of the Illinois taxpayers under a classification denying equal protection, as in this case.

The effort of American Oil to resurrect res judicata and support the Court of Appeals estoppel ruling is in direct conflict with the principles of abstention, equitable estoppel and res judicata as consistently applied by the federal courts. The emphasis now placed by this Respondent upon the Circuit Court decree dismissal "with prejudice" supports Petitioner's claim that Judge Harrington was unfit to hear plaintiff's state court suit because of his divided loyalty between the public and the Kirkland firm in which his son was a partner. Moreover, the federal courts will not permit expansion of a jurisdictional dismissal decree without a determination of whether the merits were in fact decided.

The Circuit Court ignored Petitioner's arguments that federal constitutional law forbids res judicata effect to a class action judgment unless the trial court proceedings and judgment fully comply with procedural due process. *Hansberry* v. *Lee*, 311 US 32, 41; *Mullane* v. *Central Hanover Bank*, 339 US 306, 313. See also *Acre* v. *Air Line Pilots Assc.*, 390 F.2d 199, 203 (1968) C.A. 5 (1968). *Gart* v. *Cole*, 263 F.2d 244, 249, C.A. 2, 1959. The judgment below should be reversed.

A. Respondent Claims No Substantial Federal Question Arises Under Illinois Law (Resp. pp. 2, 3)

Respondent argued the special injury rule limitation of enforcement of public rights to those suffering private injury and certain public officials served a legitimate state purpose. In practice it perpetuated fraudulent grants of public property for when the Illinois Supreme Court in 1970 repudiated special injury classification, it declared "to tell them (taxpayers) they must wait upon government action is often an effectual denial of the right for all time." *Paepcke et al.* v. *P.B.C. et al.*, 263 NE 2d 11, 18 (App. 36). The District Court opinion now relied upon by Respondent was predicated upon a novel principle that the special injury rule must be preserved for to apply the Fourteenth Amendment to it would mean the Illinois citizens would burden Illinois courts with "remote tax payers complaints without limitation" (App. 9, 304 F. Supp. 235, 237).

This unique view demonstrates the District Court's holding is wholly inconsistent with long established state and federal principles. (See Petition pp. 15-28) (App. 10-17, 21, 22, 69-72) Neither its judgment and opinion, nor Respondents briefs, its exclusive source, are a proper guide to the determination of federal constitutional and jurisdictional rights.

B. Respondent Errs in Its Claim No Federal Question Existed (Resp. pp. 4, 5)

Respondent after disregarding the substantial independent jurisdictional claims of denial of due process and equal protection misapplies *Owensboro Waterworks Co.*, 200 U.S. 38. There the city proposed to issue bonds to defray the cost of constructing its own water plant to be operated in competition with the plaintiff's privately operated company. The latter, seeking to enforce its claimed

monopoly rights, filed suit in the federal courts to enjoin the city from issuing bonds to build such municipal plant.

It is obvious that the facts and ruling can have no application here for plaintiff instituted this action because American Oil and other District corporate lessees had wrongfully converted public properties into private property. In *Owensboro* the water company sought to prevent the use of municipal funds to be used by a municipal corporation for public purposes. No questions of wrongful conversion of public property into private property was at issue in that case. Here plaintiff was asserting his property rights to recover public property which now had all the attributes of private property including the protection the law affords private persons who have acquired public property providing such acquisitions unlike the instant situation are not tainted with fraud.

This suit involves more than the recovery of equitable interest in public property, adequate and lawful rentals, and accounting for it seeks to recover large areas of land illegally held by the lessees. (C.A. App. pp. 28, 29, 35, par. 8, p. 42 K)

The property interest of taxpayers in such public property converted to private property is conclusively established. (Petition pp. 24-25, App. 69-72). Judge Will's opinion states such interest was recognized under Illinois law for all such taxpayers' actions were predicated upon equitable interest in property (264 F. Supp. at p. 469, App. 14). The interest is further approved in the *Paepcke* case upholding such taxpayers' actions (App. 36, 267 N.E. 2d, 11, 18).

This case does not present issues of illegal expenditures of public funds such as was presented in *Otto* v. *Sommers*, 332 F. 2nd 697. The attack upon the leasing procedures is simply incidental to the wrongful seizure of public property by the corporate defendants.

C. The Claim the Jurisdictional Amount Required under 28 U.S.C. 1331 Is Not Present (Resp. pp. 6, 7)

This Respondent relies upon the cursory disposition by the District Court of this issue (App. 9, 304 F. Supp. 235, 237). Though this Court stated that under *Snyder* v. *Harris*, 394 U.S. 332, class action claims could be aggregated if they were traditionally considered to be a joint and common claim it made no effort to determine the nature of plaintiff's claim. Furthermore, it disregarded Judge Will's unreported opinion of April 6, 1967 (App. 18-20) when he concluded "the property right asserted by plaintiff is held in common by all members of the class" (p. 20). Here he was attempting to recover not merely equitable interests in property for the class but the physical property itself which he claimed had been fraudulently taken from the District. None of the cases relied upon by this Respondent presented the character of traditional common claims represented in plaintiff's pleadings.

D. Respondent errs in arguing There Is No Federal Jurisdiction Under 28 U.S.C. 1343(3) (Resp. p. 7).

The contention of this Respondent disregards Petitioner's claims he was denied both procedural due process and equal protection of the laws. We refer to our original Petition (pages 15-19) as representing a complete answer to Respondent's argument.

Conclusion

An examination of the briefs filed in the Court of Appeals discloses the Kerner opinion is simply a cursory summary of defendants' briefs and disregards the function imposed upon all federal courts to independently explore and fairly determine constitutional and jurisdictional prin-

ciples. An explanation may well lie in the claims of Petitioner that his class were deprived of a due process hearing by Judge Kerner's participation. The people of this nation are accustomed to a good more from the federal courts. The District's citizens and taxpayers only remaining hope lies in the hands of this Court.

The Petition should be allowed and the judgments below reversed.

Respectfully submitted,

HARRY R. BOOTH
110 S. Dearborn Street
Chicago, Illinois 60603
AN 3-6475
Petitioner pro se

APPENDIX.

App. 1

HARRY R. BOOTH

LAWYER

110 So. Dearborn Street — Telephone

Chicago 3 — AN 3-6475

September 7, 1971

Allen Lavin, Esq.
Fred Herzog, Esq

Thomas F. Thomas, Esq.
Thomas Scully, Esq

Francis McConnell, Esq.
John Borst, Jr., Esq.

Albert E. Jenner, Jr., Esq.
Edward R. Johnston
Keith Bode, Esq.
Leah S. Hamilton

Lee A. Freeman, Esq.
Jerrold E. Salzman

Rober Barrett, Esq.

Re: Booth vs. Lemont Mfg. Corp., et al
264 U.S. Supreme Court
1971 Term

Gentlemen:

I call your attention to the following typographical errors etc. which I intend to include in my reply memorandum:

1. p. iii and 21. Bryan vs. Austin 254 U.S. 933 should be 354 U.S. 933.

2. p. 6 line 17 "litigants" should be "litigation."

3. p. 10, add at bottom of page: Such extension until August 19, 1971 was granted by Justice Marshall on August 17, 1971.

4. p. 23 line 22 add fn. 1:
Plaintiff's class were not only deprived of a hearing in the Illinois courts but his claim that the state court judgment was obtained by Defendants due to fraud was determined by Judge Will in the General Dynamics case to require a hearing. (Second unreported opinion of Judge Will) App. p. 22 par. 2.)

Very truly yours,

/s/ *Harry R. Booth*
Harry R. Booth

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71 - 264

No. ~~264~~

FILED
OCT 18 1971
E. ROBERT SEAVER, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1971

HARRY R. BOOTH,

Petitioner,

vs.

LEMONT MFG. CORP., CECO STEEL PRODUCTS CORP., PUBLICKER CHEMICAL CORPORATION, AMERICAN OIL CO., UNION TANK CAR CO., CORN PRODUCTS CO., METROPOLITAN SANITARY DISTRICT OF GREATER CHICAGO,

Respondents.

SUPPLEMENTAL BRIEF UNDER RULE 24-5

HARRY R. BOOTH
110 S. Dearborn Street
Chicago, Illinois 60603
Petitioner pro se

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60618 (312) 525-6581

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 264

HARRY R. BOOTH,

Petitioner,

vs.

LEMONT MFG. CORP., CECO STEEL PRODUCTS CORP., PUBLICKER CHEMICAL CORPORATION, AMERICAN OIL CO., UNION TANK CAR CO., CORN PRODUCTS CO., METROPOLITAN SANITARY DISTRICT OF GREATER CHICAGO,

Respondents.

PETITIONER'S SUPPLEMENTAL BRIEF UNDER RULE 24-5

To the Honorable, The Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Petitioner Submits an Additional Claim Relating to the Disqualification of Judge Otto Kerner

1. Petitioner incorporates herein and makes a part hereof his Emergency Motion To File A Supplementary Brief Under Rule 24-5 Relating To New Matters Affecting The

Disqualification of Judge Otto Kerner And For Other Relief forwarded to this Court on October 8, 1971.

2. The Motion and exhibits set forth are an adequate legal and factual basis for the disqualification of Judge Otto Kerner in the hearing and decision of this case before the Court of Appeals.

3. We consider it unnecessary to reproduce the additional many other press accounts in the Chicago and national press since July 29, 1971 commenting upon the transactions under which Judge Otto Kerner, his former law partner and close associate, Theodore Isaacs, other judges, members of the Illinois Legislature and other persons holding significant state and public office made enormous profits arising out of secret transactions with one or more firms engaged in the business of conducting horse racing in Illinois. Their existence condemns the transactions and public officials as grossly unfaithful to the people of Illinois and all those imposing any public responsibilities upon them.

4. Respondents have failed to question Petitioner's reliance upon such facts or the legal interpretation set forth in such Motion.

5. Petitioner recognizes the difficult problem of presenting all material facts bearing upon "Circumstances and relationships must be considered for the disqualifying inteerst cannot be defined with precision." (*In re Murchison*, 349 U.S. 133, 136). The underlying records upon which the Motion was predicated are in the possession of Judge Kerner or agencies of the federal government, the Department of Justice and Internal Revenue Service and are not available to Petitioner.

6. Petitioner's challenge to Judge Kerner's participation is also warranted by the consistent unwillingness of

the Respondents to accord Petitioner's class procedural due process. This is illustrated by their insistence upon a state court hearing before a Chancellor whose son was a partner in the Kerkland firm (Counsel for American Oil Co.) and their persistent demand that such judgment bars this suit as res judicata.

7. The essence of the recently published material discloses Judge Otto Kerner while Governor of Illinois, joined a substantial group of Illinois public officials who used their public positions to make large profits in firms whose operations were subject to active control by the State of Illinois through state governmental agencies and the Illinois legislature.

8. Governor Kerner did not act in a nominal capacity in this situation. Moreover, he must have been aware of the fact that he was not alone in participating in these large secret insider profits. He failed to protect the public interest.

Thus it appears he apparently violated the high public trust and responsibilities imposed upon him. The loss of public confidence in his willingness to serve only the public interest disqualifies him of his right to sit in cases such as this where the public stakes are of vast importance.

9. It is not necessary that Petitioner establish that Governor Kerner engaged in one or more similar transactions or invested in the stock of one or more District lessees. Petitioner requested access to the list of his investments and his inquiry of October 1 to the Clerk of the Circuit Court of the Court of Appeals remains unanswered.

10. We believe we have fully demonstrated that Judge Kerner's participation and opinion is heavily clouded with

the absence of both the probability and the absence of the appearance of due process.

11. These grounds, however, are independent of the several constitutional and jurisdictional principles Petitioner has established for granting of this Writ and reversal of the judgment below.

Respectfully submitted,

HARRY R. BOOTH
Petitioner pro se

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71-264

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HARRY R. BOOTH,

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Respondents.

PETITIONER'S REPLY TO THE SINGLE BRIEF OF THE FIVE CORPORATE LESSEES LEMONT MFG. CORP. ET AL.

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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 264

HARRY R. BOOTH,

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vs.

LEMONT MFG. CORP., CECO STEEL PRODUCTS CORP., PUBLICKER CHEMICAL CORPORATION, AMERICAN OIL CO., UNION TANK CAR CO., CORN PRODUCTS CO., METROPOLITAN SANITARY DISTRICT OF GREATER CHICAGO,

Respondents.

PETITIONER'S REPLY TO THE SINGLE BRIEF OF THE FIVE CORPORATE LESSEES

Petitioner incorporates herein his Reply Brief forwarded on October 8, 1971 to the Brief on behalf of a single respondent American Oil Company, which was transmitted on October 8, 1971. A number of the contentions in Respondents two Briefs are similar, if not identical, in character. It is of course not necessary to respond to each argument in Lemont's brief.

The District Court dismissed Petitioner's complaint largely upon the theory that the Illinois special in-

jury rule barring the access to the Illinois courts by 99% of the District's taxpayers did not conflict with either the due process or equal protection clauses. The court further held that the application of the equal protection clause would "force state courts to entertain the most remote taxpayers complaints without limit." (304 F. Supp. at page 37, App. 9.)

The Court of Appeals affirmed, though in the interval the special injury rule, the primary basis of Petitioner's defeat in the state courts was repudiated. (See *Paepcke* decision, App. 36, 267 NE 2nd 11-18.) Notwithstanding the bearing of the *Paepcke* case to Judge Robson's opinion and that of the Illinois courts was the Court of Appeals in its own unique opinion still found it possible to hand respondent corporations an enormous victory and the public a more devastating defeat.

The Court of Appeals in the light of the demise of Defendants' special injury principle should have exhibited some skepticism as to the validity and soundness of the other similar claims of all the Respondents. The Kerner opinion merely approved their arguments without evidence that it seriously considered our Briefs or the controlling decisions of this Court.

I. RESPONDENT'S RESTATEMENT OF THE CASE (pp. 1-5)

Respondents have improperly criticized Petitioner's statement of the case which complies with Rule 23 1(e). Unfortunately the judicial opinions in this case have overlooked the duty of federal courts in constitutional public interest litigation for they represent little more than the acceptance of Respondent's one-sided cursory version of the facts. In *England* v. *Louisiana Board,* 375 US 411, 416, 417:

> " 'It is the typical, not the rare, case in which constitutional claims turn upon the resolution of contested factual issues.' *Townsend* v. *Sain*, 372 US 293, 312 . . . 'There is always in litigation a margin of error representing error in factfinding. . . .' *Spieser* v. *Randall*, 357 US 513, 525."

The opinions below do not represent "a fair assessment of the record. *FTC* v. *Standard Oil Co.*, 355 US 396, 398." (See App. 51-53.)

II. REASONS FOR GRANTING THE WRIT

Disqualification of Judge Kerner (pp. 6-9)

Because of the interrelation of Judge Kerner's disqualification to other intervening matter we are discussing it at the conclusion of this reply.

II. Petitioner's Jurisdictional Claims (pp. 9-18)

1. Respondents Confuse Issue as Involving Only Leasing of Municipal Real Estate at Inadequate rentals.

Respondents apparently admit the Court below misunderstood the issue for they say (p. 9)

> "Essentially, the lower courts held that the nature of petitioner's complaint—dissatisfaction with the financial returns on leases of municipal real estate—did not fall within the limited subject matter jurisdiction of the federal district courts."

However, subsequently they agree the issue involves "taxpayers' actions challenging the legality or propriety of conveyances or leases of municipal real estate".[1] Moreover they have persistently as have both federal courts (with the exception of Judge Will) totally ignored the nature of the property interests held by taxpayers in

[1] (P. 11)

public land. It has been universally accepted as representing such a substantial property right as to support the right to access to the courts to protect such rights (Petition pp. 24, 25) (App. 10-17, 21, 22, 69-72)

The inconsistency of Respondent's arguments and the Court of Appeals opinions is illustrated here as elsewhere. For years Respondents argued in the state courts that they lacked any property interest justifying their access to the Illinois courts on any theory. These contentions were contrary to the view of state courts throughout the nation (App. 69-72, Petition 24, 25.)

Res Judicata and Collateral Estoppel Claims And Rulings Should Be Overruled (pp. 12-15).

Angel v. *Bullington,* 330 U.S. 183, 189-190 (1947) *Is Not "Precisely In Point."* (Lemont pp. 12-15)

The rule governing all constitutional jurisdictional and in fact all cases in this Court require that federal decisions be predicated not upon a single isolated fact but upon all relevant factors in each case. In this case the Court of Appeals was duty bound in 1971 to consider the following controlling factors which did not exist in the *Angel* case rather than blindly adopt Respondent's claims *C.I.R.* v. *Sunnen,* 333 U.S. 591, 600, 601.

(a) Petitioners claim the state judgment was invalid and lacked due process and Judge Will's ruling a factual hearing should be held upon it. (App. 22)

(b) The earlier District Court and Court of Appeals' decisions in *General Dynamics* justifying the filing of Petitioner's Lemont suit in the federal courts. (App. 10-23)

(c) The refusal of the Illinois Supreme Court in *Droste* v. *Kerner,* 217 NE 2d 73, 79, 385 US 465 (1967) (App. 37)

to abandon the special injury rule and particularly since such action was contemporaneous with the Appellate Court rule in Petitioner's state court case.

(d) Judge Kerner's relation as Governor to *Droste* v. *Kerner*. (Petition 11-15)

(e) The abstention principles including decisions of this court in *England* v. *Louisiana Bd.*, 375 U.S. 411 (Petition 23, 24).

(f) The intervening change in the Illinois rule as a result of the *Paepcke* decision (*Paepcke* v. *P.B.C. et al.*, 263 NE App. 36) repudiating the special injury principle underlying it had been the governing principle underlying earlier state and federal decisions.

The recourse to the federal courts rather than representing "a flagrant attempt at piecemeal litigation" was the only proper course Petitioner could undertake in view of the conduct of the Defendants and the above factors.

Intervening Change In Special Injury Rule Required Reversal

The intervening change in the special injury rule constitutes a repudiation of the basic legal principles argued by the Defendants in the state and federal courts, yet Respondents insist that this very repudiation is intended to constitute the basis for their victory in this Court and in the Court of Appeals. This Court has consistently ruled otherwise: *Bryan et al.* v. *Austin*, 354 U.S. 933; *Butler* v. *Eaton*, 141 U.S. 240, 242, 243; *Duke Power Co.* v. *Greenwood*, 229 U.S. 259, 267, 268; *U. S.* v. *Munsingwear*, 340 U.S. 36, 39, 40; *C.I.R.* v. *Sunnen*, 333 U.S. 591, 597.

Other Contentions

The claim (page 14) that Petitioner's attack upon the special injury rule is devoid of merit ignores: (a) the fact that practically every state in the Union where the issue has been litigated upheld taxpayers' suits to safeguard rights in public land upon the same theory that taxpayers suits were justified to prevent misuse of public funds. (App. 69-72, Petition 15-19, 24, 25). The refusal of the states generally to apply the old Illinois rule and the Illinois Supreme Court's belated repudiation of *Droste* v. *Kerner* demonstrates the irrationality and arbitrary character of the classification which these and other corporate Defendants imposed upon the Illinois Courts and Judge Robson.

Equally without merit is their claim (p. 13) that the District taxpayers could not contend that the special injury rule violated the equal protection and due process clauses. Petitioner did exactly what hundreds of other litigants have done who have contested the invalidity of state action as contrary to these clauses. Moreover, this contention apparently accepted by Judge Kerner (App. 440 F. 2nd, 388 fn. 4), discloses the improper application of the estoppel principle.

Section 1343(3) Can be Invoked Where as Here the Suit Involves a Combination of Personal and Property Rights (pp. 15-17)

Respondents ignore the substantial difference of opinion between the Kerner decision and that of other courts which upheld jurisdiction under 1343 presenting a combination of procedural due process or equal protection and property rights.[1] (Petition 15-19). *Escalera* v. *New York City Hous-*

[1] They also overlook the assumption in the Kerner opinion that Petitioner had showwn the special injury rule established jurisdiction. (440 F.2d at p. 388 App. 4)

ing Authority, 425 F. 2d 853, 864 (CA 2, 1970); *Dale* v. *Hahn,* 440 F. 2d 633, 636 (1971) CA 2, and *Cipriano* v. *Houma,* 395 U.S. 701, 702 ff; *Phoenix* v. *Kolodziejski,* 26 L. Ed. 2d 523, 527. (Petition 17-19). The Seventh Circuit in *Ream* v. *Handley,* 359 F. 2d 728, 731, relied upon in the Court's opinion, holds 1343 does not apply "where a person seeks only to protect property or monetary rights."

We have earlier demonstrated ~~that we~~ were denied procedural due process and equal protection of the laws under the special injury rule which justified invoking the jurisdiction of the federal courts. (Petition 15-19.) The personal right Petitioner sought to sustain also was directly at the restoration of the dignity and substance of honest and efficient government. One purpose of the suit was the restoration of public confidence in a government which assures public protection against private corporations who by conduct tatntamount to fraud are permitted to take possession and obtain the exclusive benefits of valuable public lands.

Respondents have also failed to call this Court's attention to federal court rulings refusing to entertain an action where, as here, a state has denied a large class of its citizens access to its courts, under the equal protection and due process clauses. As evidence of the federal court's willingness to sustain jurisdiction under 1343(3) the Second Circuit decided *Dale* v. *Hahn,* 440 F. 2d 633 (1971) on February 19, 1971 (note *Lemont* at 440 F. 2d 385).

That court followed the rule that jurisdiction under 1343(3) must be sustained whenever a combination of property and personal rights were presented. There, unlike here, the absence of due process procedure was considered relevant. Here, also, there are significant personal consequences, but by the alleged fraudulent acts under which the lessees acquired the District's public property. The

stigma of inability of individual citizens and the taxpayers as a group to safeguard their interest, the denial of access to the courts create "a stigma of incompetency" accepted in *Dale.*

In *Escalera* v. *N. Y. City Housing Authority,* 425 F. 2d 853, (1970) the court declared:

> ". . . the instant actions allege deprivations of procedural due process, a civil right, which may ultimately lead to the loss of a property right, to wit, tenancy in public housing projects. . . ."

Our allegations demonstrated clear violations of procedural due process and the equal protection clause.

Judge Kerner Was Disqualified.

We reject Lemont's argument that the governor of Illinois during 1961-1968 serves in a mere nominal capacity on the vital public issues including (a) the right of Illinois citizens to independently have recourse in the state's courts to safeguard their rights in public land resources; (b) the measures undertaken by the state itself to protect such interest against large and unscrupulous private corporations. A governor who is only a nominal figure with respect to these issues either is abandoning the public interest and is subservient to such corporations. However, Kerner could not escape responsibility for the State's policies in these areas. The Sanitary District then and (like his own today) represented the major political scandal in the state. As he participated in the approval of public land grants by signing his name to the legislative bills, *Droste* v. *Kerner,* 217 N.E.2d 73, 74, and then opposed in the state and federal courts the right of citizens to independently safeguard their interests he was duty bound to retire in the instant case when it came before the Court of Appeals.

Intervening events since the Court of Appeals rulings have demonstrated that Petitioner was correct in contending Judge Kerner was obligated to excuse himself in this case. The undisputed facts disclose that he as an insider made large secret profits in investments in racing corporations under the direct control of his appointees. It also appears that these corporations benefitted largely by additional rights granted to them by both administrative and legislative acts before and after the Governor in 1966 and 1967 engaged in these secret transactions. The probability of secret personal profits reveals that his participation and writing of the Court of Appeals' opinion lacked considerably more than the appearance of justice. (*In re Murchison,* 349 U.S. 133, 136.)

CONCLUSION

Petitioner prays that this Honorable Court grant this Petition and reverse the judgments below.

Rspectfully submitted,

HARRY R. BOOTH
Petitioner pro se

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Supreme Court, U.S.
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OCT 21 1971
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971.

No. ~~264~~ 71-264

HARRY R. BOOTH,

Petitioner,

vs.

LEMONT MFG. CORP., CECO STEEL PRODUCTS CORP., PUBLICKER CHEMICAL CORPORATION, AMERICAN OIL CO., UNION TANK CAR CO., CORN PRODUCTS CO., METROPOLITAN SANITARY DISTRICT OF GREATER CHICAGO,

Respondents.

PETITIONER'S OBJECTIONS TO CORPORATE RESPONDENTS' MOTION TO EXPUNGE AND FOR OTHER RELIEF.

HARRY R. BOOTH,
110 South Dearborn Street,
Chicago, Illinois 60603,
Petitioner pro se.

THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971.

No. 264.

HARRY R. BOOTH,

Petitioner,

vs.

LEMONT MFG. CORP., CECO STEEL PRODUCTS CORP., PUBLICKER CHEMICAL CORPORATION, AMERICAN OIL CO., UNION TANK CAR CO., CORN PRODUCTS CO., METROPOLITAN SANITARY DISTRICT OF GREATER CHICAGO,

Respondents.

PETITIONER'S OBJECTIONS TO CORPORATE RESPONDENTS' MOTION TO EXPUNGE AND FOR OTHER RELIEF.

To the Honorable, The Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Now comes Petitioner Harry R. Booth pro se and for his Objections[1] to the Motion of Respondents Lemont Mfg. Corp., et al. to expunge his Emergency Motion to File a Supplementary Brief under Rule 24-5 relating to new mat-

1. Petitioner did not receive a copy of Respondents' Opposition until 10-20-71 at 11 a.m. though upon inquiry the contents were read to him over the telephone on the prior afternoon.

ters affecting the disqualification of Judge Otto Kerner and such Supplementary Brief and for other relief and states:

1. Petitioner denies Paragraphs 1, 3 and 4 of Respondents' "Opposition" etc. and Motion. With respect to Par. 2 he states that his matters or documents are or should be properly part of the record before this Court.[2]

2. The aforesaid documents filed by Petitioner were prepared and filed by Petitioner pursuant to the obligation assumed by and imposed upon Petitioner in his efforts to safeguard the rights of his large class of taxpayers and citizens (a) in the enjoyment of their constitutional jurisdictional and other rights under Amendment XIV to a hearing and trial in federal courts and (b) to obtain relief from numerous long term leases between the Metropolitan Sanitary District of Greater Chicago and the corporate defendants and others lessees.

3. The filing of such Motion and Brief is consistent with the responsibilities of Petitioner as stated by the District Court in *Booth* v. *General Dynamics Corp.*, 264 F. Supp. 465, 471 (App. 16):

> "Finally, we believe that the instant plaintiff possesses the skill and integrity necessary fairly and adequately to protect the interests of the class."[3]

4. Petitioner's Emergency Motion and Supplementary Brief, based as they are upon the best evidence available

---

2. Though Respondent has over-stated the number of "12 judges" who reviewed this matter below (p. 2) since the Seventh Circuit then possessed only seven active judges and one had previously withdrawn from the case (Petition p. 13). Petitioner does not because of his high regard for the members of the Court consider the number significant other than indicating further evidence of the absence of infallibility of the Respondent's statements of facts. What is significant is the apparent long restrictive policy of the Seventh Circuit Court towards en banc hearings believed to practically exclude non-governmental civil litigants therefrom.

3. See also Exhibit 1.

support his claim that he has demonstrated the existence of substantial due process issues arising out of the participation of Judge Otto Kerner in the hearing before the Court of Appeals.

5. The right of Petitioner's large class to a due process hearing cannot be denied for the reason that the disclosure of all circumstances and facts may now be impossible or inappropriate in view of pending inquiries conducted by agencies of the government of the United States.

6. Petitioner's insistence upon a due process hearing even though predicated upon commonly accepted facts reflecting upon the right of a single judge of the Court of Appeals to have participated in such proceeding is not scandalous. Rather it represents an effort to balance the scales between the enormous and variety of resources available to Respondents, the power inherently exercised by such special privilege corporations, the prestige, skill, experience and success of their large law firms and the public represented by Petitioner in this litigation.

7. Petitioner's judgment as to the measures properly necessary under the law to safeguard the interests of his large class is entitled to the same weight that is generally accorded the large firms representing the private interests in this litigation. Petitioner's judgment is predicated upon some 40 years of experience serving Federal and State agencies, utility users, taxpayers, pensioners largely in contest with or regulation of special interest corporations. Such experience includes extensive litigation in this Court, the Courts of Appeal of the Seventh Circuit and the District of Columbia, other federal courts and the Illinois Supreme Court. This record does not support Respondents' allegation that Petitioner has maligned one of the judges of the Court of Appeals or that the documents filed in this Court or any of them warrant the granting of the extraordinary relief prayed for by such Respondents.

8. Petitioner's rights to a fair and impartial trial have undoubtedly been impaired. Respondents claims of non-relation thereto are immaterial and also incorrect in respect to the state court judgment.

9. There are instances, rare perhaps, when some criticism by counsel of a judge may be proper, if presented to a reviewing court. This is such an instance.

NOW THEREFORE, Petitioner pro se, Harry R. Booth, prays that this Honorable Court overrule the Motions of the Respondents, Lemont Mfg. Corp., et al. and grant the relief prayed for by Petitioner.

Respectfully submitted,

HARRY R. BOOTH,
Petitioner pro se.

HARRY R. BOOTH,
110 South Dearborn,
Chicago, Illinois 60603,
AN 3-6475.

United States Circuit Court of Appeals
For the Seventh Circuit
1212 Lake Shore Drive
Chicago

Chambers of
Judge Otto Kerner

January 2, 1940

Mr. Harry R. Booth
160 North LaSalle Street
Chicago, Illinois

Dear Mr. Booth:

I am pleased to acknowledge receipt of a copy of the opinion in the Peoples Gas Company case in which the Supreme Court reversed the Circuit Court of Cook County, thereby sustaining the contentions we made at the inception of the case.

Please accept my congratulations upon the outcome of the case. It was your splendid work, perseverance and complete confidence in the result that carried us to success.

Wishing you a Happy and Prosperous New Yeer, I remain

Sincerely yours,

Otto Kerner

Exhibit 1

SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
OCT 22 1971
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971.

No. 264 71-264

HARRY R. BOOTH,

Petitioner,

vs.

LEMONT MFG. CORP., CECO STEEL PRODUCTS CORP., PUBLICKER CHEMICAL CORP., AMERICAN OIL CO., UNION TANK CAR COMPANY, CORN PRODUCTS CO., METROPOLITAN SANITARY DISTRICT OF GREATER CHICAGO,

Respondents.

REVIEW OF THE FINAL JUDGMENT OF THE COURT OF APPEALS, SEVENTH CIRCUIT. No. 18121.

OPPOSITION TO PETITIONER'S EMERGENCY MOTION TO FILE A SUPPLEMENTARY BRIEF UNDER RULE 24-5 AND MOTION TO EXPUNGE PETITIONER'S EMERGENCY MOTION AND THE EXHIBITS THERETO FROM THE RECORD.

THOMAS M. THOMAS,
Attorney for Respondent
American Oil Company.

Of Counsel:
KIRKLAND, ELLIS, HODSON,
CHAFFETZ & MASTERS,
130 East Randolph Drive,
Chicago, Illinois 60601.

ATTORNEYS FOR REMAINING RESPONDENTS LISTED ON THE LAST PAGE OF THIS OPPOSITION.

THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971.

No. 264

HARRY R. BOOTH,

Petitioner,

vs.

LEMONT MFG. CORP., CECO STEEL PRODUCTS CORP., PUBLICKER CHEMICAL CORP., AMERICAN OIL CO., UNION TANK CAR COMPANY, CORN PRODUCTS CO., METROPOLITAN SANITARY DISTRICT OF GREATER CHICAGO,

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To the Honorable, The Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Lessee Respondents oppose Petitioner's "Emergency Motion to File a Supplementary Brief Under Rule 24-5 Relating to the Disqualification of Judge Otto Kerner and For Other Relief" and respectfully move the Court to enter an order expunging Petitioner's Emergency Motion and the exhibits attached thereto from the record.

In support hereof Respondents show the Court that:

1. The motion refers to no facts and contains no allegations of fact which could conceivably be relevant to the decision sought to be reviewed. The newspaper articles made exhibits to the motion clearly are not "intervening matter" within the purview of Rule 24-5. It is indisputable that the matters contained in the newspaper articles have no connection with this litigation or any litigant.

2. The matters referred to by Petitioner are clearly not a part of the record in this cause.

3. The assertions made in the motion and the exhibits thereto attached are specious and hearsay on their face.

Maligning one of the twelve judges below who reviewed this matter cannot possibly be a basis for granting certiorari.

Respectfully submitted,

KIRKLAND, ELLIS, HODSON, CHAFFETZ & MASTERS,
2700-130 East Randolph Drive,
Chicago, Illinois
Of Counsel.

JENNER & BLOCK,
135 South La Salle Street,
Chicago, Illinois,
Of Counsel.

MAYER, BROWN & PLATT,
231 South La Salle Street,
Chicago, Illinois,
Of Counsel.

FREEMAN, SCHMETTERER, FREEMAN & SALTZMAN,
One North La Salle Street,
Chicago, Illinois,
Of Counsel.

McCONNELL, CURTIS, MAHON & BORST,
134 South La Salle Street,
Chicago, Illinois,
Of Counsel.

THOMAS M. THOMAS,
Attorney for Respondent American Oil Company.

KEITH F. BODE,
Attorney for Respondents Lemont Manufacturing Corp. and the Ceco Corporation.

ROGER W. BARRETT,
Attorney for Respondent Corn Products Co.

LEE A. FREEMAN,
JERROLD SALZMAN,
Attorneys for Respondent Publicker Chemical Corp.

FRANCIS J. McCONNELL,
JOHN BORST, JR.,
Attorneys for Respondent Union Tank Car Company.

SUPREME COURT, U.S.

71-264

~~No. 264~~

Supreme Court, U.S.
FILED
DEC 15 1971
E. ROBERT SEAVER, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1971

HARRY R. BOOTH,

Petitioner,

vs.

LEMONT MFG. CORP., CECO STEEL PRODUCTS CORP., PUBLICKER CHEMICAL CORPORATION, AMERICAN OIL CO., UNION TANK CAR CO., CORN PRODUCTS CO., METROPOLITAN SANITARY DISTRICT OF GREATER CHICAGO,

Respondents.

PETITION FOR REHEARING OF DENIAL OF WRIT OF CERTIORARI

HARRY R. BOOTH
110 S. Dearborn Street
Chicago, Illinois 60603
Petitioner pro se

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60618 (312) 525-6581

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 264

HARRY R. BOOTH,

Petitioner,

vs.

LEMONT MFG. CORP., CECO STEEL PRODUCTS CORP., PUBLICKER CHEMICAL CORPORATION, AMERICAN OIL CO., UNION TANK CAR CO., CORN PRODUCTS CO., METROPOLITAN SANITARY DISTRICT OF GREATER CHICAGO,

Respondents.

PETITION FOR REHEARING OF DENIAL OF WRIT OF CERTIORARI

THE DECISIONS IN FLORIDA BOARD V. MACK 401 US 960 (Cert. denied) (1971) 430 F 2d 862 (CA 5 1970) REQUIRES RECONSIDERATION OF DENIAL OF BOOTH'S PETITION FOR CERTIORARI.[1]

Petitioner respectfully moves this Court for an Order vacating its denial of his Petition for a Writ of Certiorari entered on October 26, 1966 and in support thereof states:

The three federal court rulings in each of the *Mack* and *Booth* cases reveal such a gross inconsistency in the appli-

[1] Petitioner overlooked and did not refer to either the Mack or Hazel Atlas v. Hartford cases in his original Petition or Supplementary Memos filed with this Court.

cation of federal jurisdictional principles as to require reconsideration and allowance of the Booth Petition for Certiorari. Both cases were preceded by state court suits. Each set of actions involve (a) the combination of property and personal rights under 28-1343(3) or 42-1983; (b) power of federal courts to entertain suits seeking protection of federal constitutional rights litigated in part in the state courts and (c) such power where issues primarily of a local character were presented in the state courts.

In *Mack,* however, unlike the three rulings in *Booth,* the federal courts accepted jurisdiction without regard to distinctions between property and personal rights under 1343 (3) and the application of res judicata principles. This Court by a seven to two vote apparently registered its approval of the Fifth Circuit District and Appellate Court judgments[2] when over Justice White's dissenting opinion[3] joined in by the Chief Justice, it denied an application for a writ of certiorari by the Florida Board.

The underlying essence of the *Mack* decision is that notwithstanding prior litigation between the same parties in the state courts the doors of the federal courts shall be open to litigants demonstrating flagrant violations of due process and involving a combination of property and personal rights. The Fifth Circuit and not the Seventh Circuit opinion represented controlling federal jurisdictional and constitutional principles at least until October 26, 1971. *Mack,* not *Booth,* was correctly decided by the federal courts.

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[2] The Court of Appeals' Opinion is reproduced in the Appendix.

[3] Justice White's dissenting opinion stated the Florida claim that the federal courts had violated the res judicata doctrine required granting of the Florida Board's Petition for Certiorari, 401 U.S. 960-961 (1971).

The striking similarity of the critical facts and history of the two cases would seem to impose the duty upon this Court to consider the fundamental unfairness of the opinions below to the Sanitary District's 1,000,000 taxpayers who were improperly denied a hearing on the merits in both forums. The disregard by federal courts of such grave public loss is indeed unusual particularly since "moment to the public"; *Hazel Atlas Glass Co.* v. *Hartford,* 322 US 238, 246 (1944) is also a vital consideration upon review of judgments tainted with fraud.

Though the essential facts in *Mack* are found in Mr. Justice White's dissenting opinion, 401 US 960-962 (1971) a brief comparison of the two cases is now necessary.

1. In both state and federal suits, Dr. Mack claimed Florida had illegally cancelled his right to practice dentistry. The crux of his case throughout the litigation was the grave property loss he suffered by the loss of his license.[1] However, in the state courts Mack unsuccessfully argued that the Dentistry Board denied him a fair trial and that the evidence did not support revocation of his license.[2]

2. Following the Florida Appeals court decision, Dr. Mack unsuccessfully sought a Writ of Certiorari in Florida Supreme Court. Booth like Mack did not seek certiorari from the state courts to this Court. Mack instead (like Booth), then filed a new suit in the federal district court seeking relief under 42 USC 1983. Here for the first time he argued "the proceedings before the State Board were

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[1] The Kerner opinion in Booth held he could not qualify under 1343(3) for his claims for reassessment of the rental value of district property was "a claim based on alleged property rights 440 F2 385, 387 (App. 3) though he shifted his suits to the federal courts only because he had been denied procedural due process under a rule violating the equal protection clause.

[2] See dissenting opinion of Mr. Justice White, 401 U.S. 960, 961 Mack v. Pepper, 192 So. 2nd 66, 67 (Florida Court, App. 1966).

unconstitutional in that the Board acted as both prosecutor and judge" (401 US 960, 28 L.Ed. 2nd 245, 246) (1971). Thus his federal case as approved by the District Court combined not only property damage but loss of personal due process constitutional rights within 42 USC 1983 and 28 USC 1343(3).

3. As Justice White states, the Court of Appeals rejected Mack's contentions but upheld the judgment below as the hearing utterly lacked the essentials of procedural due process. It ordered the Florida Board to hold a new hearing.

4. Justice White's dissenting opinion stated the Florida Board had argued that the res judicata doctrines had been disregarded for a federal court "may not determine constitutional issues already submitted to and determined by the state court." He also cited *Bullington*, 330 US 183, that a federal court "may not even decide (constitutional) issues which could have been but were not submitted to a state court in prior litigation" (401 US p. 961).

5. Booth's initial 1963 state court complaint on a number of grounds attempted to recover the enormously valuable public property defendants and other Sanitary District lessees had wrongfully converted into private property through their numerous 50-99 year leases. However before the final trial court judgment was entered, he moved for change of venue because of the Chancellor's relationship to the firm representing American Oil Company. Here he invoked an element of personal due process rights[1] judging also by the federal court rulings in *Mack*.

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[1] Another personal issue not yet recognized as a "right" was Petitioner's desire to restore the dignity and integrity in local government. Judge Kerner's opinion ignored Booth's personal due process and equal protection rights when he said that plaintiff's case was predicated solely upon property rights (440 F. 2d 385, 387.)

6. The Illinois Appellate Court decision (App. 26) omitted any mention of the reason for his change of venue petition and also refused to permit him to amend his pleading in that court to argue intervening facts showing that certain defendants had practiced fraud on the public and the courts. The nature and purpose of this amendment was not mentioned in the court opinion (App. 29).

7. Though Mack received a hearing on the merits before the Florida Board and in the Florida Appeals Court, no such right was accorded Petitioner and his class in the Illinois courts.

8. Booth first tested the issue of federal jurisdiction in a suit against a single lessee defendant in the state action, General Dynamics Corp. The District Court here (264 F.Supp. 465 App. 10-22), as in *Mack* upheld subject matter jurisdiction (*Mack,* 296 F.Supp. 1259 S.D. Fla., 1969).

9. General Dynamics then filed a Petition for a Writ of Mandamus to expunge the District Court's jurisdictional ruling or to require to certify jurisdictional issues subsequently argued in the *Lemont* appeal.[1] The Appeals Court rejected Dynamics Petition on February 7, 1968. (App. 23) in its entirety.

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[1]Dynamies argued Judge Will's ruling upholding jurisdiction under the due process cause has never been approved by the federal courts, stating (p. 16 Petition for Mandamus):

> "Claims of violation of Fourteenth Amendment rights under these circumstances were rejected by the United States Supreme Court in Owensboro Waterworks Co. v. Owensboro, 200 U.S. 38 (1906) and by a Court of Appeals in Otto v. Somers, 332 F. 2d 697 (6th Cir. 1964) cert. denied, 379 U.S. 1002 (1965)."

Kerner's subsequent Court of Appeals opinion relied on both decisions when it sustained respondent's claims on this issue. 440 F. 2d 385, 387. (App. 3)

10. Nine months after the Court of Appeals ruling and prior to the General Dynamics settlement in April, 1969 Booth filed his Lemont suit. The decisions below have been discussed in detail in the Petition and other memoranda filed by the several parties.

11. Petitioner finds it impossible to reconcile either the reported decisions of the Fifth Circuit Courts in *Mack* with the decisions in the *Lemont* case by the Seventh Circuit Courts. Equally impossible of reconciliation is the denial of certiorari in both cases. It would appear that consideration by this Court of its own Rule 19 would have required the issuance of a Writ in this case for the Court of Appeals' *Lemont* opinion was "in conflict with the decision of another Court of Appeals on the same matter" and the Seventh Circuit Court has "decided an important question of federal law which has not been, but should be, settled by this Court."[1] In fact though Petitioner believes Mack was correctly decided and Lemont was not, Mack presented a far stronger case for the application of the Bullington doctrine except for the fact that Mack again demonstrates that the federal courts generally do not apply the Bullington doctrine to cases such as *Mack* or *Lemont*. Neither the Court of Appeals' opinion in *Lemont* or the briefs submitted by Respondents cited other federal court decisions sustaining the application for Bullington to litigation involving the peculiar and distinguishable facts such as *Lemont*.

12. However, there were other circumstances justifying a reversal of the opinions below and the allowance of the

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[1] And see Stern-Gressman, 4th Ed. Supreme Court Practice, Sec. 4.4, p. 154-155; Sec. 4.5, p. 156-158; Sec. 4.11, 4.12, p. 167-170; 4.15, 4.16, 4.18, p. 175-180.

Writ in this case. We have earlier here noted this court's landmark decision in the *Hazel Atlas* case, 322 US 238, 246, 247. The facts indicating fraud vary from case to case. Surely Hazel Atlas and related cases demonstrate the need of early rather than belated inquiry into issues of fraud and due process adversely affecting the constitutional rights of plaintiff's class to a fair and impartial determination of such issues. Petitioner submits this is the occasion for express action by this Court to settle the confusion and differences of opinion among the several federal courts as well as litigants therein with respect to fundamental issues of property and personal rights, the application of res judicata and collateral estoppel and other basic issues presented herein determining the jurisdiction of the federal courts.

WHEREFORE, Petitioner Harry R. Booth, pro se, prays that this Honorable Court grant this Petition for Rehearing, and his Petition for a Writ of Certiorari to the Court of Appeals of the Seventh Circuit, and that it further reverse the judgments of the Court of Appeals and the District Court in the instant proceedings.

Respectfully submitted,

HARRY BOOTH,
110 So. Dearborn St.,
Suite 411,
Chicago, Illinois 60603

CERTIFICATE OF COUNSEL

I hereby certify that this Petition for Rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 58(2).

/s/ *Harry R. Booth*
Petitioner Pro Se

APPENDIX

APPENDIX

DR. ROY F. MACK, Plaintiff-Appellee,

v.

The FLORIDA STATE BOARD OF DENTISTRY, Defendant-Appellant.

No. 28085

UNITED STATES COURT OF APPEALS,

FIFTH CIRCUIT.

July 7, 1970.

Rehearing Denied and Rehearing En Banc Denied Aug. 17, 1970.

(430 F2 862)

Suit under Civil Rights Act and Fourteenth Amendment for restoration to plaintiff of his license to practice dentistry. The United States District Court for the Southern District of Florida, 296 F.Supp. 1259, entered judgment for plaintiff and the State Board appealed. The Court of Appeals, Coleman, Circuit Judge, held that where dentist who presided over hearing by Florida State Board of Dentistry erroneously sustained many objections of Board's attorney to evidence sought to be produced by dentist, often erroneously overruled objections from dentist's counsel and permitted one attorney for Board and one attorney for dentist to indulge in continuous personal

acrimony so that proceeding was an ungoverned confrontation, dentist was denied the admistrative hearing to which he was entitled.

Affirmed in part and in part vacated and remanded.

1. *Physicians and Surgeons* — 11(3)

Florida State Board of Dentistry, in proceeding to revoke professional license, was not limited to evidence beyond a reasonable doubt.

2. *Administrative Law and Procedure* — 472

Administrative hearings are not required to be conducted with all the formalities and strictures of a criminal case.

3. *Physicians and Surgeons* — 11(3)

Where dentist who presided over hearing of Florida State Board of Dentistry, in proceeding to revoke professional license, erroneously sustained many objections of Board's attorney to evidence sought to be produced by dentist, often erroneously overruled objections from dentist's counsel and permitted one attorney for Board and one attorney for dentist to indulge in continuous personal acrimony so that proceeding was an ungoverned confrontation, dentist was denied the administrative hearing to which he was entitled.

4. *Physicians and Surgeons* — 11(3)

Where there was probable cause for bringing charges of professional misconduct against dentist, suspension of his license pending hearing on charges was neither unjust nor inequitable.

Edward H. Robinson, Richard L. Randle, Robinson & Randle, Jacksonville, Fla., for defendant-appellant.

Horton & Schwartz, Alan R. Schwartz, Malloy H. Horton, Miami, Fla., for plaintiff-appellee.

Before BELL, COLEMAN, and AINSWORTH, Circuit Judges.

COLEMAN, Circuit Judge:

Upon complaint, notice, and hearing the Florida State Board of Dentistry revoked the license of Dr. Roy F. Mack to practice in that State. Without filing any specific findings of fact, the Board held Dr. Mack to have been guilty of causing in the yellow pages of the Greater Miami Tele. Directory (p. 863) a listing for Palm Springs General Hospital with his private number, of advertising professional services at a greatly reduced cost to certain members of trade unions, and of taking improper personal liberties with female patients which would bring discredit upon the dental profession.

Dr. Mack first obtained review of the proceedings by the Fourth Florida District Court of Appeals. He argued that the procedure before the Dental Board was such that he was deprived of a fair and impartial hearing and that the Board's findings were not supported by substantial competent evidence. The Florida Court of Appeals, with no discussion of the events at the "hearing" held these contentions to be without merit and denied relief, Mack v. Pepper, 192 So.2d 66 (1966). The Supreme Court of Florida denied certiorari without written opinion.

Dr. Mack then filed an original suit in the United States District Court for the Southern District of Florida under the Civil Rights Act of 1871, 42 U.S.C.A. § 1983, and the

Fourteenth Amendment to the Federal Constitution, seeking the restoration of his license.

The opinion of the District Court disposing of the case is published, 296 F. Supp. 1259 (1968).

There is no point in paraphrasing the opinion here. Suffice it to say, the District Court decided two questions.

[1] First, it held that the Board in proceeding to revoke a professional license was not limited to evidence beyond a reasonable doubt. With this we definitely agree, see 296 F. Supp. at 1262.

Second, the District Court held that "the mixing of functions of the Dental Board [investigating complaints, weighing the reports, filing charges, holding hearings, and deciding the merits (with its attorney conducting the "prosecution")] constituted a deprivation of procedural due process in contravention of the Fourteenth Amendment. For the reasons hereinafter set forth we modify the decision of the District Court on this question and do not decide issues not necessary to the decision of the controversy.

This Court has made an independent examination of the transcript [518 pages] of the purported hearing given Dr. Mack by the Dental Board on February 18, 1966. The hearing began at 9 o'clock in the morning and concluded at 11:35 o'clock that night. The Board declined to continue the hearings into the next day or to adjourn to some other day because that would inconvenience its members. It declined to leave the record open to allow the testimony of a prominent medical doctor who was temporarily absent in Atlanta. It declined to leave the record open to allow an examination by a urologist to determine whether

Dr. Mack was impotent, which had become the paramount issue in the hearing.

The Dentist who presided over the hearing frankly stated that he was not a lawyer and was unfamiliar with the rules of evidence. This ordinarily would be of no particular moment, but Dr. Mack was represented by counsel and dozens of evidentiary questions arose. The chairman sustained at least ninety per cent of objections raised by its attorney, many times erroneously. He over-ruled about the same proportion of objections from Dr. Mack's counsel, often erroneously.

Dr. James Chimerakis, a licensed osteopathic physician, testified that he had examined Dr. Mack and found him to be impotent as the result of a rare disease. He produced x-rays of Dr. Mack which he had taken and which his assistant had developed. He said he knew of his own knowledge that the x-rays were of Dr. Mack. The Board excluded them because the written identification appeared on the envelope rather than on the film. The Board said the envelope might have been switched.

Most seriously of all, from the beginning of the "hearing" until its bitter end, one of the attorneys for the Board and one of the attorneys for Dr. Mack (864) indulged in continuous personal acrimony, charges and counter charges, attacking each other with unconcealed venom, both as to their personal attributes and their professional competency. An experienced judge would have nipped this in the bud and, if continued, these attorneys would no doubt have swiftly found themselves the objects of discipline. The chairman, of course, did not know how to cope with this and made a very feeble effort to do so. It is no excuse to say that it was provoked by either side.

To get down to brass tacks, this was not a hearing. It was an ungoverned confrontation. We hold that Dr. Mack, as a matter of fact, has not had a hearing in that sense required of anything which claims to be an administrative hearing as known to the jurisprudence of this Country.

In so holding, we imply no affirmative criticism of the Board Members. They were not lawyers. Their mistake was in not selecting some competent attorney as a presiding officer, preferably acceptable to both sides, who could have kept the hearing within due bounds while the Board Members heard the evidence.

[2, 3] We do not intimate that such a procedure is Constitutionally required. We suggest it only as one way by which this situation may be avoided a second time around. Neither do we insinuate that administrative hearings must be conducted with all the formalities and strictures of a criminal case. They do not. A man who is about to lose a professional license which he has held for twenty years, however, is entitled to develop his defense in freedom from what took place in this case.

The judgment of the District Court will be affirmed on the sole ground that Dr. Mack has not had a hearing on the charges preferred against him. The case will be remanded to the District Court so that the Florida State Dental Board may, if it wishes, conduct a lawful hearing within not more than sixty days after the receipt of our mandate in the District Court.

[4] We indicate no view of the merits of this case. On the record as a whole it is seen that there was probable cause for the bringing of the charges. We hold, therefore, that a suspension of the license pending a hearing is neither unjust nor inequitable. The license will remain suspended

as ordered by the District Court until a hearing can be held or until the expiration of the sixty day period as herein provided.

The District Court will give no directions to the Florida State Dental Board as to the modus operandi of its hearing. That is the responsibility of the Board and a duty for it to discharge, within the requirements of the Constitution.

As to a hearing for Dr. Mack, the standard of proof required, and the suspension of the dental license pending a hearing, as hereinabove set forth, the judgment of the District Court is affirmed.

In all other particulars, the judgment of the District Court is vacated.

The case will be remanded for further proceedings not inconsistent herewith.

Affirmed in part, and in part vacated, and remanded.

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 23 Federal Rules of Appellate Procedure, Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is denied.